



Pursuing  
Good  
Governance

ADMINISTRATIVE JUSTICE  
IN COMMON-LAW AFRICA

**EDITORS**

HUGH CORDER & JUSTICE MAVEDZENGE

PURSUING  
GOOD  
GOVERNANCE

# Pursuing Good Governance

ADMINISTRATIVE JUSTICE IN COMMON-LAW AFRICA

# Pursuing Good Governance

ADMINISTRATIVE JUSTICE IN COMMON-LAW AFRICA

*Editors*

HUGH CORDER  
JUSTICE MAVEDZENGE

2019



First published 2019  
by



Siber Ink CC  
PO Box 30702  
Tokai 7966  
Cape Town  
SOUTH AFRICA

[www.siberink.co.za](http://www.siberink.co.za) © Siber Ink CC

ISBN 978-1-928309-30-7 (print format)  
ISBN 978-1-928309-31-4 (pdf format)

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-nd/4.0/> or send a letter to Creative Commons, PO Box 1866, Mountain View, CA 94042, USA.



Typesetting and cover by G J du Toit  
Printed and bound by Tandym Print, Cape Town

# Contents

Foreword . . . . .	vii
ARNE WULFF	
Introduction . . . . .	ix
HUGH CORDER	
<i>Chapter</i>	<i>Page</i>
1. The State of Administrative Justice in Lesotho. . . . .	1
HOOLO 'NYANE	
2. The State of Administrative Justice in Zambia . . . . .	21
FELICITY KAYUMBA KALUNGA AND O'BRIEN KAABA	
3. The Control of Administrative Power in Zimbabwe and Implications of Substantive Fairness as a Ground of Review . . . . .	47
JUSTICE ALFRED MAVEDZENGE	
4. The State of Administrative Law in Malawi: Systems, Structures and Emerging Issues . . . . .	67
REDSON E. KAPINDU AND FIDELIS E. KANYONGOLO	
5. An Overview of the Framework Governing Administrative Justice in Kenya. . . . .	92
CECIL ABUNGU	
6. Resurgent Judicial Power and Administrative Law in Uganda . . . . .	107
RONALD KAKUNGULU-MAYAMBALA	
7. Administrative Justice in South Africa: An Overview of Our Curious Hybrid . . . . .	120
LAUREN KOHN AND HUGH CORDER	

# Foreword

The Rule of Law Programme for Sub-Saharan Africa of the Konrad-Adenauer-Stiftung supports regional initiatives aimed at realising an effective and efficient administrative justice system in Africa. Such a system must be anchored upon respect for the rule of law, functional separation of powers, accountability, and good governance.

This is particularly important as the continent moves towards constitutional democracy where the protection of human and constitutional rights is indispensable. In a responsive and participative democracy, the citizens must be assured of having means of protection against the violation of their rights. As such, the composition, procedures, powers, duties, rights and liabilities of the various organs of government, public and other bodies that are engaged in administering public functions must be within legal bounds.

In August 2018, the Rule of Law Programme for Sub-Saharan Africa organised a regional workshop on *'The State of Administrative Justice in Commonwealth Countries in East and Southern Africa'* in Gaborone, Botswana. This brought together experts from these regions who deliberated on the state of administrative justice in their countries with a view to exploring viable solutions towards the realisation of fair, effective and independent administrative justice systems in Africa.

Over the last two decades, much law reform has been undertaken in many of the States in these two regions, albeit in an uneven manner. For instance, South Africa, Malawi, Uganda, Kenya, and Zimbabwe have followed the pioneering example of Namibia, which constitutionalised the right to administrative justice in its independence Constitution of 1990.<sup>1</sup> Whereas this is a commendable step forward, implementation of these reforms remains a challenge.

In the workshop it was noted that the development of the ideal administrative justice system on the continent is a long-term venture. Nevertheless, it is one which must be undertaken in order to ensure that administrative authority is exercised in a lawful, reasonable and procedurally-fair manner. Consequently, where people's rights and interests are adversely affected by the decision and action of any administrative authority, adequate remedies must be provided.

The idea of documenting the state of administrative justice in Common Law Africa was mooted which has resulted in the publication of this book. The countries included in this book mostly rely on judicial review as the bedrock of administrative justice. However, there is an increasing push for consideration of alternative and additional means of securing administrative justice, such as the use of Ombudspersons, appeals tribunals, standing commissions which focus on human rights protection, open governance, among others.

---

<sup>1</sup> Article 18 of the Constitution of Namibia, 1990.

We wish to thank Prof. Hugh Corder and all the authors involved for their willingness and commitment in producing this book. I am sure the book will find broad readership and thus make an invaluable contribution towards the realisation of fair, effective and independent administrative justice system in Africa for greater accountability.

DR ARNE WULFF

*November 2019*

*Director of the Rule of Law Programme for Sub-Saharan Africa*

*Konrad-Adenauer-Stiftung*

# Introduction

HUGH CORDER\*

This book is the culmination of a slightly attenuated project, in itself the regional extension of research and law-reform work with which I have been intimately involved since 1991. As the demise of apartheid and the establishment of a constitutional democracy beckoned in early 1991, I set off on a timely period of sabbatical leave from the University of Cape Town. Travelling to Australia, Canada and the UK, I focused my attention on three broad areas in which South African constitutional and administrative law had been impoverished by virtue of its expulsion from the Commonwealth in 1961, and the self- and externally-imposed isolation which marked academic life in the subsequent three decades. These were the methods for the selection and appointment of superior-court judges; the role of Parliament in holding the executive to account; and the reform of administrative law broadly, including various non-judicial means of reviewing the validity of administrative conduct.

As it turned out, through no grand plan but rather a substantial degree of good fortune, I ended up finding myself in a position to play an influential role in the formulation of constitutional law on all three fronts. This was chiefly through my membership in 1993 of the Technical Committee on Fundamental Rights during the Transition, a small group which advised the multi-party negotiations process which drafted South Africa's first democratic constitution: our part was to draft the transitional bill of rights.<sup>1</sup> This process resulted in the inclusion of a 'right to administrative justice' in the Bill, not an unprecedented step (Namibia had done so just four years earlier<sup>2</sup>), but certainly highly unusual. This was both the conclusion of a considerable amount of activity agitating for meaningful administrative law reform, but also marked the start of a thorough-going process of redirecting both judicial review of administrative action but also exploring alternative means of subjecting such action to external scrutiny, to ensure compliance with lawfulness, procedural fairness, and reasonableness.<sup>3</sup>

---

\* Project leader.

<sup>1</sup> For an account of our work, see Lourens du Plessis and Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994), in particular chapter 1.

<sup>2</sup> See the Constitution of Namibia (1990), article 18.

<sup>3</sup> For an overview of this decade of administrative law reform, see Hugh Corder 'Reviewing review: much achieved, much more to do', chapter 1 in Hugh Corder and Linda van de Vijver (eds) *Realising Administrative Justice* (2002).



However, given the origins of the right to administrative justice in Namibia, and the subsequent adoption of similar rights in the newly-made constitutions of other Commonwealth states such as Uganda, Malawi, Kenya and Zimbabwe, it seemed natural to me that lawyers from such jurisdictions should gather to compare common problems and exchange experiences. In 2016, I approached the Konrad Adenauer Foundation's Rule of Law programme based in Nairobi, and they kindly agreed to provide funding. Below are the terms in which I cast the proposal:

**'An Intervention to Secure a Greater Degree of Administrative Justice Reform  
in East and Southern Africa**

**Context**

The achievement of reasonable compliance with the requirements of administrative justice has, over the past three decades, come to be seen as an indispensable part of any constitutional democracy. In particular, the role which administrative fairness and efficiency can play in the protection of human and constitutional rights is increasingly recognised, as the notion of "democracy" advances from a majoritarian representative model to a participative and responsive model. Some form of review of the exercise of all forms of public power or the performance of a public function, whether done by a public or private authority, is an essential element of the rule of law in any system of government that pretends to be a constitutional democracy. When the notion of protected rights expands to include the provision by the State of socio-economic benefits such as welfare payments, access to housing and basic amenities of life, healthcare and education, the fair and equitable distribution of such social goods is absolutely critical. Access to such rights and benefits should not be confined to the chosen few nor to those well connected with one or other *locus* of authority or power. Proper compliance with the requirements of administrative justice thus becomes an essential element of a participative democracy.

While this review function is typically seen historically as being part of the work of the courts (judicial review of administrative action lies at the core of many African jurisdictions), attention is increasingly being given to alternative means of securing administrative justice, such as ombuds-like institutions, appeals tribunals, standing commissions which focus on human rights protection, open governance/ access to information, legislative oversight of the executive branch of government, and so on. There is much innovation in this sphere across the world, and increasing "borrowing" from other legal systems, even including across the traditional common law / civil law divide. The world is becoming a smaller place.

Within east and southern Africa, most states share a common background in legal doctrine and institutions in this area of the law. Law reform has occurred over the past 20 years, but unevenly across these states. Many [South Africa, Malawi, Uganda, Kenya, and Zimbabwe] have followed the pioneering example of Namibia, which constitutionalised a right to administrative justice in its independence Constitution of 1990 (article 18). Such rights send out important signals both to the government and the citizenry, but need structural expression and widespread implementation. Several of these states have complemented the constitutional rights with Acts of Parliament which provide for the definition and implementation of these rights in greater detail.

In any process of law reform, it is wise not to attempt to reinvent the wheel, while always recognising that wholesale transplantation from one legal system to another is rarely successful or a good idea. Nevertheless, it would be foolish to ignore similar

initiatives in different parts of the world. There are essentially two major “families” of administrative law in the world. One group consists of administrative law that is based on the English common-law (and to be seen particularly in the countries of the British Commonwealth, and to a much lesser and more distant extent in the United States of America). The second group consists of administrative law that is based on the civil law systems of continental western Europe, which in itself tends to be divided between those based on the French and those based on the German model.

So there are many models to look at, but why has there been this high level of activity in this area of the law? There are many reasons for this, but chief among them are the growth of executive and administrative power within the nation state in the second half of the 1900’s, the rising expectations among ordinary people that the state should provide basic services (such as health, educational and social services), the state’s need to regulate economic and social life, especially as urbanization gains pace among a rising population, and the necessity for allocating considerable discretion to state officials to empower them to provide services, but qualified by the need that they should be provided equitably, reasonably, transparently and fairly.

Ultimately, therefore, what is needed is a change of culture, towards greater accountability.

### **Proposal**

Against this background, it is argued that this is an appropriate moment to consider the establishment of a network of administrative justice leaders drawn from most countries in eastern and southern Africa, to take stock of the state of administrative justice in each country and to consider common problems. Furthermore, such experts should consider how they could both learn from each other and co-operate with each other to raise levels of compliance with administrative justice standards.

### **Objectives and Outcomes**

The objectives of this network should be:

- To research and write a series of reports on the state of administrative justice in each of their jurisdictions, pointing particularly to problems and areas in need of review and reform;
- To share their knowledge, in an endeavour to learn comparatively and to create a common platform for the consideration of steps needed, both nationally and possibly regionally, to attempt practically to develop mechanisms for the delivery of greater levels of administrative justice among a wider pool of the citizenry of these parts of the continent; and
- To draft and approve a Statement of Principles which could serve as an inspiration for reform and an encouragement to those in authority (including judges and magistrates) to take administrative justice seriously, as an essential means to raising the commitment to the observance of human rights throughout the region.

The outcomes would be a position paper which responds to common problems and draws on common themes; an approved Statement of Principles; a consolidated database of knowledge in the field, widely accessible and trusted; and the publishing of an edited book which would likewise be widely available through electronic means, as well as in hard copy for limited distribution among opinion-makers within the law and the courts, both in the region and beyond.

### **The Methodology**

It is proposed that these objectives be achieved in three phases:

1. An initial gathering of about 24 experts, plus about six support staff, ideally in August/September 2018, in one of the participant countries, perhaps Tanzania or Malawi. Over three days, it is proposed that experts drawn from Botswana, Kenya, Lesotho, Malawi, Namibia, South Africa, Tanzania, Uganda, Zambia and Zimbabwe should present position papers on their own jurisdictions, and undertake to produce further work according to an agenda for reform whose elements would be agreed upon at that gathering.
2. From after this initial gathering, the realisation of the further work referred to above, by the national experts leading small, informally-constituted “teams” who would research and write the position papers, which should be completed by early 2019, and consolidated on one website, for access by every member of the project.
3. A final gathering of the same group as initiated the project in step 1, in Lusaka, Zambia, in March/April 2019, with the objective of agreeing on the content and drafting of the Lusaka Principles for Administrative Justice, and in preparing the text of the constituent chapters of the book referred to above, which would appear within six months of the conclusion of this last event.’

While I intended to initiate the project during 2016, student protests and extensive disruptions in higher education caused delays, due to my assuming temporary roles in central university management for much of 2016 and 2017. The Foundation proved to be very patient, and the first phase of the project described above took place in Gaborone, Botswana, in late August 2018. The participants were as follows: *Botswana*: Dr Bonolo Dinokopila, Head of Department of Law and Mr Gosego Lekgowe, University of Botswana; *Kenya*: Professor Migai Akech, University of Nairobi and Mr Cecil Yongo, Strathmore University; *Lesotho*: Associate Professor Hoolo 'Nyane, University of Limpopo; *Malawi*: Associate Professor Fidelis (Edge) Kanyongolo, Chancellor College, University of Malawi, Judge Redson Kapindu, High Court of Malawi, and Professor Danwood Chirwa, University of Cape Town (also South Africa); *Mauritius*: Professor Prakash Torul (unable to attend, through ill-health); *Namibia*: Ms Yvonne Dausab, Chair, Namibian Law Reform and Development Commission; *South Africa*: Professors Cora Hoexter, University of the Witwatersrand and Hugh Corder, University of Cape Town and Dr Justice Mavedzenge, University of Cape Town (also Zimbabwe); *Uganda*: Dr Ronald Kakungulu and Dr Kabamba Busingye, Makerere University; *Zambia*: Ms Felicity Kayumba Kalunga and Dr Obrien Kaaba, School of Law, University of Zambia; *Zimbabwe*: Dr Admark Moyo; and a comparative scholar Chuks Okpaluba, Emeritus Professor, University of Fort Hare, South Africa.

The report (revised and shortened for this purpose) of the proceedings at this meeting was compiled by Dr Justice Mavedzenge of the University of Cape Town's Democratic Governance and Rights Unit. I reproduce it here as a matter of public record, as some of the jurisdictions did not provide more detailed reports for the second stage of the project as envisaged, and because in my view it provides at least a useful framework for future research and even legislative reform, where appropriate.

**'Report of the Workshop on Administrative Justice in East and Southern Africa,  
held in Gaborone, Botswana, from 28 to 31 August 2018**

1. Opening remarks

Professor Hugh Corder gave the following historical account of events that predated this conference:

- i. A similar conference had been held in 1996 under the theme "Administrative Justice in Southern Africa", following the "Breakwater Declaration" (emanating from a conference in February 1993 held in Cape Town) which became the blueprint for administrative-law reform in South Africa.
- ii. In 2014, Corder, funded by the Konrad Adenauer Foundation (KAS), acted as a consultant to the Law Reform and Development Commission of Namibia leading extensive discussions on whether Namibia should adopt the South African approach of enacting primary legislation to regulate the exercise of administrative authority, and in providing greater detail to the broad and general grant of the right to administrative justice in its Constitution.
- iii. The founding of the Administrative Justice Association of South Africa in 2012, which brought together in one body academic and practising lawyers in the field, with senior public servants, was followed by national gatherings in 2016 and 2017, and this led to increased attention on administrative justice in the region.
- iv. Professor Hugh Corder, working together with a team which comprises of Professors Cora Hoexter, Danwood Chirwa, and Migai Akech, and Dr Justice Alfred Mavedzenge, convened this gathering with the following objectives: (1) to take stock of the state of the administrative law framework in the countries represented; (2) to bring experts together so that they can learn from each other and engage critically on administrative justice issues; (3) to identify the most urgent common challenges confronting administrative justice in the jurisdictions represented at the conference; and (4) to explore the relevance of alternative mechanisms for regulating the exercise of public power, as means for reducing the over-judicialisation of administrative justice.
- v. Professor Hugh Corder also highlighted that there was a need to discuss the accessibility of mechanisms to achieve administrative justice, especially given the socio-economic situation in most jurisdictions.

2. Jurisdictional introductions

Each country represented then presented a brief oral overview of the main features of the administrative justice system as it pertained at the time.

2.1 Botswana

- i. The right to just administrative conduct is not expressly guaranteed in the Constitution or in any statute. Judicial review of administrative conduct is performed in terms of the common-law
- ii. There are alternative channels for judicial review of administrative conduct. The primary avenue is the Ombudsperson's office, which has the power to review and give remedies in respect of cases of maladministration in general. There is a variety of internal appeal mechanisms established in terms of specific legislation. These include the Public Service Commission (whose mandate is to review disputes in terms of the Public Service Act), and disciplinary tribunals set up in terms of the Police Act and the Prisons Act.
- iii. The key challenges include the following: There is no law which expressly gives individuals the right of access to information, and the absence of a constitutional and statutory right to just administrative conduct means the

standards of review are confined to those recognized in common-law principles including natural justice.

## 2.2 Kenya

- i. There is a constitutional right to just administrative conduct and Parliament has enacted the Fair Administration Act to give effect to that right.
- ii. There are alternative channels for review of administrative conduct. There are about 21 tribunals established in terms of specific Acts. The challenge is rather that the people are unaware of these tribunals and how they can use them to access justice. In addition to these tribunals is the office of the Ombudsperson, whose recommendations are not binding.
- iii. There is also a constitutional right of access to information held both by the state and private persons.
- iv. The biggest challenge is the lack of diligent implementation of the Constitution.

## 2.3 Lesotho

- i. The Constitution does not provide for a right to just administrative conduct, nor does it provide for a right of access to information. Judicial review of administrative action is on the basis of English common law (legality, rationality and procedurally fairness, estoppel, and so on).
- ii. Alternatives to judicial review include the Ombudsperson's office, but its recommendations are not binding. There are tribunals established in terms of specific legislation but there are numerous ouster clauses which make certain decisions non-reviewable by these tribunals.
- iii. Amongst the challenges are that in addition to/as a consequence of the absence of the constitutional/statutory right to just administrative conduct and access to information, the rules of standing to sue are strict. The legal framework on administrative law is fragmented.

## 2.4 Malawi

- i. There is a constitutional right of access to information and a constitutional right to administrative justice which allow the courts to go beyond reviewing on the basis of natural justice and common law. Rules of court procedure (for example High Court rules) have been reformed to align with the Constitution.
- ii. However, the challenge is that litigants continue to ignore this right and rely on common-law principles of review.
- iii. Alternatives to judicial review exist. They include the office of the Ombudsperson, which deals with issues which cannot be remedied through judicial review and whose decisions are binding. There are also specific legislative tribunals which include environmental appeals tribunals, but the challenge is that people do not know about these tribunals. Some of the tribunals exist only on paper.
- iv. In addition to the above, one challenge is that the distinction between executive and administrative action is still unclear in the jurisprudence. There is also a challenge regarding the extent to which decisions taken as part of indigenous law are reviewable under administrative law, and a further challenge is the judicialisation of political issues.

## 2.5 Namibia

- i. There is a constitutional right to administrative justice.
- ii. There is no principal Act to facilitate the implementation of this right.
- iii. As an alternative to judicial review there is the office of the Ombudsperson, but this does not have enough human and material capacity to deliver

administrative justice. There are specific tribunals set up in terms of legislation, for example Immigration tribunals, and so on.

- iv. In addition to the above, the challenges include that the judiciary is often accused of not making decisions that enhance social justice, and there is a failure or refusal by government to comply with court decisions. In some instances, the legislature has attempted to enact laws to reverse court decisions, and poverty makes access to justice a huge challenge.

## 2.6 South Africa

- i. There is a constitutional right to administrative justice, which was inspired by Namibia and has now been exported to other jurisdictions. A principal Act to implement that right also exists and is called the Promotion of Administrative Justice Act (PAJA).
- ii. Standing to sue is very broad in terms of s 38 of the Constitution, which has to be read into the PAJA.
- iii. Ouster clauses are effectively unconstitutional as there is a right of access to court (section 34).
- iv. The challenges include over-reliance on judicial review at the expense of other avenues such as access to Information and the various State institutions supporting constitutional democracy (the 'Chapter 9' institutions). Further, administrative law is wrongly perceived as law for the elite, yet it is a tool to fight for social justice. Access to administrative justice is undermined by poverty and state capture. Thus, the legal framework looks sufficient on paper but in practice it is not working well.

## 2.7 Uganda

- i. Article 42 of the Constitution guarantees the right to apply for review of administrative action. The grounds for review include legality, procedural fairness, rationality and principles of natural justice.
- ii. Alternatives to judicial review include the Ombudsperson and commissions of inquiry as well as numerous tribunals established in terms of specific Acts.
- iii. A key challenge is that the independence of the judiciary is compromised. In addition, the rights to administrative justice and to a fair trial are conflated by judges, as well as the common-law right to just administrative conduct and the constitutional right to just administrative conduct, and yet there are important practical differences between the two.

## 2.8 Zambia

- i. In spite of a recent amendment to the Constitution, the Bill of Rights was not amended and thus there is still no constitutional right to just administrative conduct. However, the Constitution provides for principles of fair administrative justice to be observed.
- ii. There is also no constitutional right of access to information.
- iii. Review of administrative conduct is on the basis of common-law rules and principles.
- iv. Alternatives to judicial review mainly consist of the Office of the Public Protector, and administrative tribunals which are there to review cases of maladministration.

## 2.9 Zimbabwe

- i. The Constitution provides for a right of access to information as well as a right to just administrative conduct. Notably, this right includes the right to administrative conduct that is efficient and substantively fair.

- ii. There is a principal Act to give effect to the right to administrative justice. However, the Act predates the constitutional right.
  - iii. Alternatives to judicial review include legislative tribunals as well as independent constitutional commissions.
  - iv. Challenges include compromised judicial independence, lack of harmony between the principal Act on administrative justice and the Constitution, a plethora of ouster clauses and a fragmented legislative framework.
3. Relationship between the constitutional provision/foundation, statutes, the role of the common law and separation of powers issues
- A broad-ranging discussion was then held in plenary session on the above issues. The following points emerged from the discussion:
- i. Most constitutions entrench the principles of the rule of law, constitutional supremacy and democracy, which are signposts of good governance. The area that we need to emphasise more is that of constitutional values, which are meant to make democracy meaningful. These values include accountability, responsiveness, openness, and public participation. These are not fundamental rights but we need to engage with them and ask: what role do they play in advancing administrative justice? Standing to sue should be liberalized. Principles governing fair public administration need to be entrenched.
  - ii. Are constitutional values helpful and whose values are they? These values have been ignored in some jurisdictions, while in some they have played a meaningful role. There is merit in including values in the constitution because over time the courts will define what those values mean and this will impact positively on the interpretation of the content of the rights enshrined therein. It is important to ensure that these values are a true reflection of the values of the people.
  - iii. Is it necessary to enact statutes in addition to the constitutional right? Statutes tend to be restrictive and therefore undesirable. However, some participants argued that statutes are necessary as they provide valuable detail regarding what is really expected from administrators. In South Africa, the Promotion of Administrative Justice Act is narrow and complicated in its definition of administrative action and this has caused the courts to sidestep it and rather apply the principle of legality.
  - iv. On the separation of powers: The critical question is not whether the judiciary is competent to review decisions made by officials from other branches of government. The question is rather: how far should the judiciary go? That question is likely to feature prominently in jurisdictions where administrative justice as a right establishes “efficiency” as a standard of review.
  - v. In reality, the separation of powers often does not exist. In some jurisdictions, the question is actually whether the judges should even engage in review as some of the issues are heavily political and polycentric in nature.
4. The scope of judicial of review: lawfulness, procedural fairness and rationality/ reasonableness
- The key issues that emerged from this plenary discussion are as follows:
- i. As to procedural fairness, the gold standard should be the general duty to act fairly. Procedural fairness continues to be determined by context, and this creates some uncertainty regarding what this standard of review entails in reality. There might be tension between the duty to act promptly and the duty to ensure procedural fairness. This could see further restriction of procedural fairness as a ground.

- ii. On reasonableness as a ground of review: ouster clauses and the reversing of the onus are a challenge in some of the jurisdictions, such as Zimbabwe and Uganda.
  - iii. On lawfulness: In countries where there is no constitutional/statutory right to administrative justice, the question that remains unanswered is how to challenge the legality of decisions made by traditional chiefs.
5. Judicial review v non-curial safeguards and the role of media and civil society.
- The key issues which emerged from this discussion are:
- i. Alternative channels of accessing administrative justice remain useful, especially given how expensive it is to access the courts. There is a need at both scholarly and practical levels to work to understand and strengthen these institutions. For example, empirical research is required on questions such as how many people are using them, who is using them, how they are performing, and what resources are being invested into these institutions.
  - ii. A concern, however, is the independence of these tribunals to apply the law and deliver justice. In some jurisdictions the tribunals are too numerous, have duplicated roles and are fragmented. Borrowing from labour law, where various forums have been established to resolve labour disputes outside of judicial review, should be considered.
  - iii. Changing the perception that administrative law disputes should always be judicialised is a priority. This perception may have undermined the utilisation of the alternatives. As has emerged from the updates on jurisdictions above, the existing tribunals need greater resourcing.
  - iv. Apart from using tribunals, establishing “preventive measures” within the legal framework, such as requirements for public participation, is needed to ensure safeguards against maladministration.
  - v. Independent constitutional commissions are an important alternative avenue. One of the issues to be worked on is whether these institutions have binding authority. This kind of conversation needs to take place at a local level and also to penetrate the university curriculum, so that equal attention is paid to these alternatives.
  - vi. Governments ought to be challenged to put out information to the public in order to raise public awareness of these internal appeals. People with knowledge of administrative law should step in and make use of the media, including social media, and civil society organisations, to push for justice and to counter maladministration. In some jurisdictions, however, the media are not really interested in “non-political and non-sensational” issues.
6. The way forward
- 6.1 AdjESA: There was general support for establishing the Administrative Justice Association for East and Southern Africa (AdjESA). Such a platform would make it possible to continue with critical conversations on this subject in a more sustainable manner. It will enhance networking and information-sharing. It should not be made up of academics only but also practitioners, and all those active in the administrative justice sector. Participants should canvass this idea in their countries and establish country chapters. Such structures are relatively simple to establish, but the real challenge is to keep them vibrant and effective. Questions were asked along these lines: What would AdjESA do? How often would its members gather? Would it publish a newsletter? How would it be financed? Prof Corder agreed to circulate a draft constitution for the AdjESA at least two months before



the next meeting, in order to allow those present to canvass the idea widely within their domestic context, and bring responses to the next meeting.

- 6.2 Drafting national reports from each jurisdiction represented: Participants from each country should come together with interested parties from their national jurisdiction and jointly prepare a paper (maximum of 8 000 words) covering broadly the following areas/questions, where relevant, which would be presented at the next conference:
- a) A culture of accountability
    - i. The role of administrative justice in a participatory democracy and in enhancing socio-economic rights.
    - ii. A choice to make: imposing an obligation on the public administration v granting enforceable rights to administrative justice to every individual in the state--- or maybe this is not a choice, but both could be pursued?
  - b) Issues within judicial review:
    - i. The exercise of public power should definitely be subject to administrative review, but what about “privatised” public power, and even private power itself?
    - ii. What is and should be the enduring role of the (English) common law in the context of either a constitutional right or a statute, or both?
    - iii. What is the appropriate role of the judicial branch of government, in relation to the executive, under your understanding of the separation of powers? Ideally, the concept of deference as *mutual* respect should be the guideline.
    - iv. What constitutional role does Parliament have as “oversight” mechanism (of the exercise of public power)?
    - v. In relation to the grounds of review, how are flexibility of administrative discretion and the uncertainty of the meaning to be given to concepts like lawfulness, procedural fairness and reasonableness, to be balanced?
    - vi. What progress has been made in developing novel remedies, including awarding compensation for unlawful administrative decisions?
    - vii. Should there be norms and standards for rulemaking and rule application?
    - viii. What about the role of indigenous law in administrative law/justice?
  - c) Alternatives to judicial review
    - i. How binding in law or public perception are the recommendations made by ombudsman-type bodies, including human rights commissions?
    - ii. What mechanisms are/should be in place to encourage full public participation?
    - iii. What administrative appeals and review tribunals exist? Are they effective? Should other administrative tribunals be established? What resources are being invested, appointments processes, etc.
    - iv. What measures should be taken to enhance access to information?
    - v. Is the establishment of a separate administrative court structure, or even a special division of the existing high court structure, a desirable way forward?
    - vi. What measures need to be taken to educate and train both judicial officers and every member of the public administration in the principles and practices of administrative justice?

As is sometimes the case, ambitious plans and good intentions are insufficient to ensure the timeous completion of the next phase of a project, in this case the completion of the 'country reports', and their circulation in advance of the second meeting of this interest group, which was scheduled for mid-2019. While several participants diligently met the deadlines communicated, some were unable to do so, despite substantial allowances for late submission. Regrettably, therefore, KAS decided that it could not continue financial support, but graciously agreed to sponsor the publication of those papers which had indeed been submitted. Hence this book.

Each of the chapters has been subjected to blind peer review by two senior administrative law scholars in the region, and their comments have been incorporated. Dr Mavedzenge has been primarily responsible for the editing of these chapters to seek to secure a degree of compliance with a common approach to the topics and house style, although there are inevitably variations in the degree of attention given to some aspects rather than others, dependent on the conditions in each jurisdiction. The hope is that this will be the start of greater knowledge of the administrative justice institutions, structures and landscape within most of the Commonwealth countries in the regions and that, having co-operated on this joint venture, future occasions for sharing experiences and ideas among administrative lawyers and public servants will be more feasible. AdJESA has not been formed, but the foundation for greater levels of joint work exists. At the very least, these contributions highlight the points of strength as well as the many challenges which confront the achievement of a better state of administrative justice in the seven countries surveyed.

Finally, I would like to thank all the participants in the first meeting, and those who followed through by writing and submitting their reports which have become the chapters in the rest of this book; Dr Arne Wulff and Mr Peter Wendoh of KAS for their support for this project, and Ms Clara Arzberger, an intern at KAS who attended the Gaborone gathering, and assisted with recording the discussions. My co-editor, Justice Mavedzenge, has been a constant source of cheerful and efficient assistance; it has been a pleasure to work with him: I am greatly in his debt.

## CHAPTER 1

# The State of Administrative Justice in Lesotho

HOOLO 'NYANE\*

### ABSTRACT

Administrative law in Lesotho, like constitutional law, is pre-eminently based on the English common law. That notwithstanding, the usual influence of South African law cannot be underestimated. Although the 1993 Constitution of Lesotho was adopted in the same year as the South African Interim Constitution which provided for the right to administrative justice, the Lesotho Constitution does not provide for the right to administrative justice. The Constitution provides for a bifurcated human rights structure wherein human rights are put into two categories—social and economic rights on the one hand, and civil and political rights on the other. The social and political rights are non-justiciable while political rights are legally enforceable. The country does not have a statute specifically codifying administrative law. As a result, judicial review has occupied the central stage as the single most important cornerstone of administrative justice in the

country. Nevertheless, there is an unpleasant fluidity and inconsistency in the manner in which superior courts in Lesotho apply various aspects of judicial review in the area of administrative law. In the majority of cases, courts feel constricted by the narrow English law-based doctrine of *ultra vires* which is animated by the 'intention-of-parliament' principle. This 'weak' model of judicial review is the major shortfall of administrative law in Lesotho. The purpose of this chapter, therefore, is to evaluate the state of administrative justice in Lesotho. Using the scoping approach, the chapter evaluates major kingpins of administrative justice such as the Constitution, judicial review, ouster clauses and the role of extra-curial institutions like parliament and the office of the ombudsman. The ultimate contention is that the country must introduce the right to administrative justice in the Constitution and operationalise it through a statute.

## 1. INTRODUCTION

Administrative law in Lesotho is, to a very great extent, based on the common law.<sup>1</sup> Nevertheless, sporadic pieces of legislation have started to emerge on various aspects of administrative law such as the rules of natural justice.<sup>2</sup> The common law applicable in Lesotho is the Roman-Dutch law since 1884 when the country was

---

\* LLB (Lesotho) LLM(NWU) LLD(UNISA). Associate Professor and Head of Public and Environmental Law, University of Limpopo.

<sup>1</sup> There is no statute dedicated to codifying administrative law in Lesotho.

<sup>2</sup> Statutes like the Lesotho Police Act 7 of 1998 and Lesotho Defence Act 4 of 1996 already have rules of natural justice inbuilt within their disciplinary provisions.

dis-annexed from the Colony of the Cape of Good Hope.<sup>3</sup> When this happened, the law that was to be applicable in Lesotho was to be the law that would ‘as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope’.<sup>4</sup> The common law that was applicable in the Cape was the Roman-Dutch common law.<sup>5</sup> As such, the common law that was to apply in Lesotho, despite the resumption of direct rule on Lesotho (then Basutoland) by England,<sup>6</sup> was to be Roman Dutch law. When the country became independent in 1966, the common law of the country remained the same; and it remains so even under the current Constitution.<sup>7</sup> However, administrative law remains one of the branches of the law in Lesotho, perhaps like constitutional law, that are still immensely based on the English jurisprudence.

When Lesotho became independent from Britain, most of the British constitutional conventions were codified into the independence constitution. As Palmer and Poulter pointedly capture it, ‘one of the distinctly English contributions to the Constitution of Lesotho is the transplantation of many of its constitutional conventions into the corpus of the instrument.’<sup>8</sup> Despite the huge influence that the South African law has had on Lesotho law generally,<sup>9</sup> constitutional law and administrative law—due to strong English influence—remain largely British-based. In recent times, one of the contributing factors for Lesotho’s over-reliance on English administrative law rather than South African administrative law is that the latter has advanced in two fundamental respects. Firstly, South Africa has provided for the right to administrative justice in its constitution<sup>10</sup> and, secondly, it has codified its administrative law into one organic statute.<sup>11</sup> These two fundamental advancements in contemporary South African administrative law have rendered it not to be the most preferred comparative point of reference for the development of administrative law in Lesotho. It is important to note, though, that prior to the current new dispensation in South Africa, Lesotho used to draw immensely from South

<sup>3</sup> James Beardsley ‘The common law in Lesotho’ (1970) 14 *Journal of African Law* 198; Sabastian Poulter ‘The judicial system of Lesotho’ (1970) 3 *The Comparative and International Law Journal of Southern Africa* 63; Winston Maqutu and Antonius Sanders ‘The internal conflict of laws in Lesotho’ (1987) *The Comparative and International Law Journal of Southern Africa* 377; Antonius Sanders *Internal conflict of laws in South Africa* (1990).

<sup>4</sup> General Law Proclamation 2B of 1884, Sec 2; see also Sabastian Poulter ‘The common law in Lesotho’ (1969) 13 *Journal of African Law* 127.

<sup>5</sup> John Pain ‘The reception of English and Roman Dutch law in Africa with reference to Botswana, Lesotho and Swaziland’ (1978) XI *The Comparative and International Law Journal of Southern Africa* 137.

<sup>6</sup> Lehlohonolo Machobane ‘Perceptions on the constitutional future for the Kingdom of Lesotho’ (1988) 26(2) *The Journal of Commonwealth & Comparative Politics* 185.

<sup>7</sup> See the Constitution of Lesotho, 1993.

<sup>8</sup> Vernon Palmer and Sabastian Poulter *The Legal System of Lesotho* (1972) 305.

<sup>9</sup> Lesotho shares the Roman-Dutch common law with South Africa. See Beardsley (*supra* note 3) 198; Palmer and Poulter (*Ibid* 127). However, the development of common law in South Africa is much more advanced than in Lesotho and Lesotho depends on advancements in South Africa disproportionately.

<sup>10</sup> See s 33 of the Constitution of South Africa, 1996.

<sup>11</sup> Promotion of Administrative Justice Act 3 of 2000.

African common and case law on administrative law. In fact, the superior courts in Lesotho invariably relied on cases from South Africa so much that it can safely be argued that to a certain extent Lesotho and South Africa shared a common law on administrative law prior to the 1993 Interim Constitution of South Africa.

As Lesotho is still not yet so advanced as South Africa on alternative avenues of redress against administrative injustice, the doctrine of judicial review remains the single most important bedrock of administrative justice. The country follows the predominantly 'weak' model of judicial review due, in large part, to its Westminster pedigree which has strong affinities with the notion of parliamentary sovereignty.<sup>12</sup> The notion of parliamentary sovereignty is known for its animosity towards any form of check on the power of parliament. It is captured crisply by British writers Allan and Thomson thus: 'In some countries ... the judges are permitted to review legislation in order to establish whether it complies with the ... constitution. In the United Kingdom, the absence of a written constitution with the status of a high law and the doctrine of parliamentary supremacy prevent the judge from exercising this role.'<sup>13</sup>

The purpose of this chapter is to survey the state of administrative justice in Lesotho, through assessing the development of judicial review as the bedrock of administrative justice in that country. In the end, the paper contends that Lesotho needs to have a constitutional right to administrative justice and codification (statutorisation) of administrative law.

## 2. CONSTITUTIONAL BASIS FOR ADMINISTRATIVE JUSTICE

The current Constitution of Lesotho was adopted in 1993 after a long period of dictatorship that spanned the period 1970–1986 and government by the military that lasted from 1986 to 1993.<sup>14</sup> Thus, the post-independence history of Lesotho is punctuated by a lack of constitutionalism and a weak version of administrative justice.<sup>15</sup> When the country returned to constitutional democracy in 1993, an opportunity was missed to bridge the gap between the past characterised by weak rule of law, lack of constitutionalism and weak human rights record and the future based on

<sup>12</sup> Alon Harel and Adam Shinar 'Between judicial and legislative supremacy: A cautious defense of constrained judicial review' (2012) *International Journal of Constitutional Law* 950–953 where the authors contend that the jurisdictions including the UK, Canada, New Zealand, and several states and territories of Australia have adopted schemes that can be characterized as forms of 'constrained judicial review'. They contend further that under American style, 'judicial review [is] also known as strong judicial review. Under that view, the judiciary is the 'ultimate expositor' of constitutional meaning, having the final say over constitutional interpretation'. See also Kenneth Arenson 'Rejection of the power of judicial review in Britain' 1996 *Deakin Law Review* 37.

<sup>13</sup> Michael Allen and Brian Thomson *Cases and Materials on Constitutional and Administrative Law* (2008) 541.

<sup>14</sup> Tefetso Mothibe 'Lesotho: The rise and fall of military-monarchy power-sharing 1986–1990' (1990) 20(4) *Africa Insight* 242.

<sup>15</sup> Khabele Matlosa and Neville Pule 'The military in Lesotho' *African Security Review* (2001) 10(2) 62.

administrative accountability, rule of law and strong constitutionalism.<sup>16</sup> Instead, the new Constitution became more of the replica of the Westminster-based independence constitution.<sup>17</sup>

The key values which underpin administrative justice such as the rule of law, separation of powers and accountability are not expressly provided for in the Constitution. The judiciary has been smart enough to infer them from certain provisions of the Constitution. For instance, in the case of *Attorney General v Swissbournh Diamond Mine*,<sup>18</sup> the Court of Appeal affirmed that the rule of law is part of the constitutional edifice of Lesotho. In that case, the court said,

No government, however powerful be its military arsenal, however awesome its police power and, indeed even however popular be its actual or perceived support among the populace at any given time in its history, dare be permitted to invade such fundamental rights, however humble, however impotent, be the victim of such transgressions; that the courts will fiercely protect such a citizen against the invasion of his rights ...<sup>19</sup>

This formulation has laid the firm foundation for rule of law and legality in Lesotho. In the subsequent cases, the superior courts in Lesotho have inferred the rule of law and legality from the Constitution of Lesotho.<sup>20</sup>

In a similar manner, the courts have inferred the doctrine of separation of powers to be a part of the constitutional edifice of Lesotho.<sup>21</sup> However, the extent to which the courts are prepared to enforce separation of powers is a matter of considerable controversy. For instance, in the case of *Sekoati v President of the Court Martial*<sup>22</sup> the Court of Appeal confirmed that while separation of powers is the bedrock of constitutionalism in Lesotho, the country embellishes the partial as opposite to the purist model of separation of powers. This is the case in which the military mutineers were challenging the propriety of allowing the Minister responsible for Defence to appoint the Court Martial. Their contention was that

<sup>16</sup> Hoolo 'Nyane, 'Development of the Constitution of Lesotho since independence: The critique of Westminster design in Lesotho' in Tumelo Tsikoane (Ed) *Lesotho at Fifty Years of Independence: Aspects of Chequered Development Journey* pp 121–139.

<sup>17</sup> Hoolo 'Nyane 'Development of constitutional democracy: 20 years of the Constitution of Lesotho' (2014) 21 *Lesotho Law Journal* 59–88.

<sup>18</sup> LAC 1995–99 at 214.

<sup>19</sup> Ibid 224E–G. This formulation of the rule of law was made by Mahomed P in Lesotho in 1996. The same formulation was made by him sitting in the Supreme Court of Appeal of South Africa in 1999 in the celebrated decision in the case of *Speaker of the National Assembly v De Lille* 1999 (4) SA 863. The learned judge said, 'The constitution is the ultimate source of all lawful authority in the country. No parliament, however bona fide or eminent its membership, no President however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the constitution. Any citizen adversely affected by any decree, order, or action of any official body, which is not properly authorised by the constitution is entitled to the protection of the courts.'

<sup>20</sup> *Lesotho Police Staff Association (LEPOSA) v Commissioner of Police* CIV/APN/18/2018 (Unreported).

<sup>21</sup> *Khathang Tema Baitsukuli v Maseru City Council* C of A (CIV) No 4 of 2005 <https://lesotholii.org/ls/judgment/high-court/2005/74>, accessed on 1 January 2019; *The Law Society of Lesotho v. The Prime Minister* 1985–89 LAC 129; *Judicial Officers' Association of Lesotho v Right Honourable the Prime Minister Pakalitha Mosisili* (Constitutional Case No. 3/2005 <https://lesotholii.org/ls/judgment/high-court/2006/150>, accessed on 15 January 2019).

<sup>22</sup> LAC (1995–1999) 812.

the Minister is a member of the executive and therefore should not be permitted to appoint the Court Martial. The court dismissed that contention and decreed that,

An absolute separation of a given tribunal from the executive or legislative branches is impossible, the question is: what degree of interference is permissible in terms of the Lesotho Constitution? In our judgment in the context of a military tribunal established under the Constitution which contains a section such as section 24(3), it is acceptable that the convening authority and the confirming authority should be vested with the powers conferred upon them by the Act and the Rules.<sup>23</sup>

Furthermore, the Constitution of Lesotho embodies a bifurcated model of human rights. The human rights are divided into socio-economic rights (styled as principles of state policy) and political rights (styled as fundamental human rights and freedoms).<sup>24</sup> The former rights are not justiciable while the latter are considered justiciable.<sup>25</sup> Administrative justice is not envisaged as a right in the Bill of Rights. Instead, equality and justice appear in the Constitution as 'principles of state policy' and thus unenforceable.<sup>26</sup>

The Constitution has a supremacy clause which usually becomes the safety valve against arbitrariness and administrative overzealousness.<sup>27</sup> The supremacy clause notwithstanding, the country appears to be still entrapped within the British predisposition towards parliamentary sovereignty. This approach has been adopted by the High Court in the cases of *Khaketla v Honourable Prime Minister*<sup>28</sup> and *Tsang v Minister of Foreign Affairs (Tsang)*.<sup>29</sup> In *Tsang*, the High Court, rather bizarrely, opined that '[t]he law of Lesotho is the same as the law of England and Republic of South Africa. An Act of Parliament is supreme. Once it has been properly passed by the Military Council the courts must give effect to it'.<sup>30</sup> Conversely, the Court of Appeal in the case of *Attorney General v Swissbourgh Diamond Mine*<sup>31</sup> held a different view thus: 'the doctrine of parliamentary sovereignty, which had its origin in English law ... never properly became part of the common law of South Africa

<sup>23</sup> Ibid 21.

<sup>24</sup> Civil and political rights are located in Chapter II while social and economic rights are located in Chapter III and are styled 'Principles of State Policy'.

<sup>25</sup> Section 25 of the Constitution provides that,

The principles contained in this Chapter shall form part of the public policy of Lesotho. These principles shall not be enforceable by any court but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles.

<sup>26</sup> Section 26(1) of the Constitution provides that, 'Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

<sup>27</sup> See s 2 of the Constitution of Lesotho, 1993.

<sup>28</sup> *Khaketla v The Honourable Prime Minister* CIV/APN/145/85 <https://lesotholii.org/ls/judgment/court-appeal/1985/118>, accessed on 15 January 2019.

<sup>29</sup> *Tsang v Minister of Foreign Affairs* 1993-94 LLR-LB 45 (HC).

<sup>30</sup> Ibid 60.

<sup>31</sup> *Supra* note 18.

or Lesotho and that it had merely been imposed and maintained as a matter of political expediency ...<sup>32</sup>

It can therefore be safely argued that due to the supremacy clause and the finding of the Court of Appeal in *Swissbourgh Diamond Mine*, the parliamentary sovereignty construct is really not part of Lesotho's constitutional law.

### 3. JUDICIAL REVIEW

#### (a) *Theoretical basis of judicial review in Lesotho*

In view of the weak constitutional basis for administrative justice in Lesotho, judicial review has become the most important lever of administrative justice. The model of judicial review followed in Lesotho is pre-eminently based on the English theory of judicial review. Under the Westminster-based models, the court's power of review is limited to the way in which the power conferred by Parliament is exercised, otherwise known as the doctrine of *ultra vires*.<sup>33</sup> That is basically judicial review in the administrative-law sense; 'the power of the courts to scrutinise and set aside administrative decisions on the basis of certain grounds'<sup>34</sup> or 'intention-of-parliament' model. This model is located within the overarching British constitutional theory of parliamentary sovereignty which posits that there is no 'judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional'.<sup>35</sup> The work of the court is to search for the intention of parliament and give effect to it. The maiden case of this approach in Lesotho is *Khaketla v The Honourable Prime Minister*.<sup>36</sup> The court *in casu* remarked that in terms of Lesotho's constitutional law, 'however unjust, arbitrary or inconvenient any legislation may be, it must be given its full effect. It is not the province of the Court to scan its wisdom or policy and the Court must take the statute as it finds it'.<sup>37</sup>

Although sometimes the Parliament may not have given the courts express powers of review, the underlying theoretical presupposition is that Parliament 'cannot have intended to give administrative agencies the freedom to exceed or abuse their powers, or to act unreasonably'.<sup>38</sup>

<sup>32</sup> Ibid 225.

<sup>33</sup> See *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111. The overriding justification for judicial intervention is the doctrine of *ultra vires*—The doctrine that power (*vires*) must be exercised within the confines of the law set out by parliament. As Hoexter pointedly contents at 111,

The doctrine ... is tied to constitutional fundamentals associated with the Westminster system: separation of powers, parliamentary sovereignty and the rule of law ... The legislature is the supreme lawmaker, while the function of the courts is to apply the law made by it.

<sup>34</sup> Cora Hoexter *Administrative Law in South Africa* 1st ed (2007) 109.

<sup>35</sup> Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* 8th ed (1915) 85.

<sup>36</sup> *Khaketla v Honourable Prime Minister* (CIV/APN/145/85).

<sup>37</sup> Ibid 19.

<sup>38</sup> Peter Cane *Administrative Law* (2004) at 405 where the author criticises the 'intention-of-parliament' justification for judicial review in three fronts. Firstly, that the process of interpreting the statutes is not always about the intention of parliament; it involves a lot more. Secondly, judicial review is more of a mechanism through which the courts exercise control than a mere corollary of parliamentary sovereignty. Its content and the remedies provided are more of the



Judicial review in the constitutional designs that follow the American model represents a somewhat different approach. Since the decision in *Marbury v Madison*,<sup>39</sup> the American model of judicial review has been growing in leaps and bounds, to the extent that it has even taken on the form of being a threat to majoritarianism.<sup>40</sup> Some scholars have even dared to call it the basis for 'judicial supremacy'.<sup>41</sup> The American model is anchored in 'strong review'; that 'the judiciary is the 'ultimate expositor' of constitutional meaning, having the final say over constitutional interpretation'.<sup>42</sup>

In Lesotho, courts have invariably pronounced that the model of judicial review is English-based.<sup>43</sup> The judicial policy in Lesotho to follow the Westminster model of judicial review may be seen to be at variance with the central theory of the Constitution of Lesotho. The Constitution of Lesotho, despite its historical pedigree from the Westminster system, is written and it is supreme.<sup>44</sup> That clearly puts Lesotho's design in sharp contrast to the English design.<sup>45</sup> The resort to the English model of judicial review may be justifiable on the basis that English administrative law in general is a convenient reference point for the majority of Commonwealth countries that have not yet 'statutorised' their administrative laws.

### **(b) The scope of judicial review**

Although judicial review is such an important tool of public law in general and administrative law in particular, it is not limitless. The courts of law in Lesotho have limited the scope of judicial review under` mainly two heads; firstly, by consistently distinguishing it from appeal. Secondly, by limiting reviewability—the decisions that may be reviewable and those that may not.

On the distinction between review and appeal, the courts in Lesotho assiduously follow the *dictum* of Lord Brightman in the case of *Chief Constable of the North*

---

creatures of the judiciary than parliament. Thirdly, judicial review has grown beyond statutory organisations. Even organisations or institutions that are not necessarily created by parliament have in recent times become the subject of judicial review.

<sup>39</sup> *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

<sup>40</sup> Jeremy Waldron 'The core of the case against judicial review' (2006) *Yale Law Journal* 1346; Alexander Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1986) at 16–17 contends that,

[J]udicial review is a counter-majoritarian force in our system. ... [W]hen the Supreme Court declares unconstitutional a legislative act ... it thwarts the will of representatives of the actual people of the here and now ...

<sup>41</sup> Harel and Shinar (*supra* note 12).

<sup>42</sup> Harel and Shinar (*supra* note 12) 953.

<sup>43</sup> In the case of *Law Society of Lesotho v Ramodibedi* (Constitutional Case No. 1 of 2003) Maqutu J at para 7 said,

It seems to me that the present constitutional dispensation is a continuation of a tradition that Lesotho has inherited from Britain. Time and time again when constitutional problems arise Britain is our first reference point.

<sup>44</sup> The courts in Lesotho have had countless occasions where they have either nullified the Acts of Parliament or reviewed the decisions of parliament itself.

<sup>45</sup> The Constitution of Lesotho has largely codified the British constitutional conventions.

*Wales Police v Evans*,<sup>46</sup> that ‘judicial review is concerned, not with the decision, but with the decision-making process’.<sup>47</sup> The flagbearer of Lesotho’s approach on the matter is the recent decision of the Court of Appeal in the case of *Raphuthing v Chairman of the Disciplinary Hearing*<sup>48</sup> where the court reaffirmed that ‘except in exceptional circumstances, review proceedings are not concerned with the merits of the case but with correcting erroneous decision-making. If a public body exceeds its powers, the court will exercise restraining influence.’<sup>49</sup>

While the distinction between appeal and review appears straightforward in theory, in practice it has not been that easy. The elasticity of the grounds of judicial review have, almost invariably, defied the traditional boundaries between these two concepts. Courts often invoke grounds such as unlawfulness and irrationality to overturn decisions of administrative decision-makers on review.

Another traditional limiting factor for judicial review has been the categorisation of decisions into executive, administrative or quasi-judicial. This categorisation suggested that judicial review may not be invoked on a decision that is purely executive. In contemporary practice in Lesotho, this categorisation is no longer of any consequence. The most recent decision of the Court of Appeal which shattered these traditional boundaries is the case of *The President of the Court of Appeal v Prime Minister*.<sup>50</sup> The case was concerned with the reviewability of the decision of the Prime Minister to appoint the tribunal to investigate the impeachability of the President of the Court of Appeal. It was argued on behalf of the Prime Minister that the decision was not reviewable because it was purely executive. The Court of Appeal disagreed and held that ‘it is the adverse effect of the decision of the public official on the rights of the individual, and not the classification of that act as administrative, that gives rise to the presumption of the requirement of fair procedure’.<sup>51</sup> This approach had earlier been taken in *Commander of the Lesotho Defence Force v Mokoena*<sup>52</sup> where the decision of His Majesty the King was reviewed and

<sup>46</sup> [1982] 3 ALL ER 141.

<sup>47</sup> At 154d.

<sup>48</sup> C of A (CIV) 45/2014. Nevertheless, within the labour disputes, the lines between review and appeal are very blurry. This is due to the legislation that establishes the labour courts in Lesotho. For instance, s 228F The Labour Code Amendment Act 3 of 2000 for instance, provides that ‘the [Labour Court] may set aside an award on any grounds permissible in law and any *mistake of law that materially affects the decision*’ (emphasis supplied). Practically, this section has meant that anybody who is dissatisfied with the arbitral awards of the Directorate on Dispute Prevention and Resolution (DDPR) takes them ‘on review with the Labour Court. See the Labour Appeal Court Decision in the case of *Mohlobo v Lesotho Highlands Development Authority* LAC/CIV/A/2/2010 [https://lesotholii.org/ls/judgment/labour-appeal-court/2011/2/mohlobo\\_judgment\\_pdf\\_19818.pdf](https://lesotholii.org/ls/judgment/labour-appeal-court/2011/2/mohlobo_judgment_pdf_19818.pdf), accessed on 26 January 2019.

<sup>49</sup> Para 13.

<sup>50</sup> C of A (CIV) 62/2013.

<sup>51</sup> 2000–2004 LAC 539 at para 14. The court also followed the South African decision in *Attorney General, Eastern Cape v Blom* 1988 (4) SA 645 (A).

<sup>52</sup> C of A (CIV) 12/2002 <https://lesotholii.org/ls/judgment/court-appeal/02-111>, accessed on 26 January 2019.

set aside, and the case of *Matebesi v Director of Home Affairs*<sup>53</sup> which concerned the decision to transfer a civil servant that was equally reviewed and set aside.

Thus, it becomes apparent that the scope of judicial review in Lesotho will continue to be elastic regard being had to the fact that it exists within the common-law framework. Its scope will largely depend on case law. The greatest concern, however, is that the courts (particularly superior courts) have been inconsistent in their interpretation of the scope of administrative law review.

### (c) *Grounds of judicial review*

On the matter of grounds of administrative review, the superior courts in Lesotho follow the trilogy of the grounds as laid out by the House of Lords in the case of *Council of Civil Service Unions (CCSU) v Minister of the Civil Service (CCSU)*.<sup>54</sup> In this case, Lord Diplock laid out the three grounds of judicial review to be 'illegality', 'irrationality' and 'procedural impropriety'. Since the trilogy was developed within the English common-law context, the court still properly forewarned that 'that is not to say that further developments on a case by case basis may not in the course add further grounds'.<sup>55</sup> The influence of this case in Lesotho has been phenomenal. In fact, the Court of Appeal in the case of *Muyanja v Morate High School Board*<sup>56</sup> remarked that 'the High Court ... retains the inherent review power under the common law ... on the well-known grounds of illegality, irrationality and procedural impropriety as laid down in the seminal case of Council of Civil Service Unions v Minister for the Civil Service'.<sup>57</sup> As the court in the *CCSU* case instructively pointed out that the list of the heads for judicial review is not exhaustive, the superior courts in Lesotho have also adopted the other grounds as they evolved in other jurisdictions, mainly in Britain and South Africa. The other grounds that have taken root in Lesotho are 'proportionality' and 'legitimate expectation'. The succeeding discussion will highlight how each ground has evolved in Lesotho.

#### (i) *Illegality*

This ground is the most common ground of review in Lesotho as it is underpinned by the classical doctrine of *ultra vires*. It may be expected that this ground will continue to evolve, particularly within the ambit of the broader doctrine of the rule of law and legality. Nevertheless, in its classical sense it is intended to generally guard against unlawfulness in administrative practice. Unlawfulness may take several forms such as, but not limited to: a) an administrative functionary exceeding jurisdictional competence by purportedly exercising the powers it does not have; b) by not directing itself properly in law; c) by delegating the statutory powers without express authorisation; d) by failing to fulfil the statutory duty; and

<sup>53</sup> 1997–98 LLR 455.

<sup>54</sup> [1985] AC 374.

<sup>55</sup> *Ibid.*

<sup>56</sup> C of A (CIV) No.40/11 <https://lesotholii.org/node/3296>, accessed on 27 January 2019.

<sup>57</sup> *Ibid* para 10.

e) by interference with fundamental rights and other constitutionally guaranteed rights.<sup>58</sup> The superior courts in Lesotho have invoked this ground under several circumstances. Invariably, the courts have used this ground to quash the delegated legislation that had been promulgated without proper authority.<sup>59</sup>

## (ii) Irrationality

The nature of this ground in Lesotho is yet to be extrapolated by the courts. However, it is not hard to fathom that its nature is based on the how it has evolved under English administrative law. In England, the judiciary is divided on whether this ground is unreasonableness or irrationality. In the case of *Provincial Picture Houses v Wednesbury Corp*,<sup>60</sup> the court referred to it as ‘unreasonableness’. In the *CCSU* case, the House of Lords suggested that the two are synonymous. The court said that, ‘by irrationality I mean what can by now be succinctly referred to as ‘*Wednesbury* unreasonableness’. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question ... could have arrived at it.’<sup>61</sup>

The Court of Appeal had an occasion to apply this ground in the case of *Mareka v Commander of Lesotho Defence Force*.<sup>62</sup> In this case the appellants sought the review of the decision of the Minister of Defence to establish the Court Martial to try them for alleged mutiny. Their contention was that the decision was irrational because, *inter alia*, it was made prematurely as it was the intention of the Government of Lesotho to establish a commission to enquire into the veracity of the charges laid against them. They argued that charges should only have been instituted after, and if, the commission established that the charges were based on accurate allegations. The court declined to grant review on the basis of this ground. The basis of the court’s finding was that the alleged ‘irrationality’ does not pass the *Wednesbury* test. In terms of this test the decision must be ‘so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.’<sup>63</sup> This formulation is in keeping with the old formulation in the South African case of *Union Government v Union Steel Corporation*,<sup>64</sup> that unreasonableness on its own is not a sufficient ground for review. The unreasonableness must be so gross that something else

<sup>58</sup> See Allen and Thomson (*supra* note 13). See also the House of Lords decisions in *Anisimic v Foreign Compensation Commission* [1969] 2 AC147; *Wheeler v Leicester City Council* [1985] AC 1054; *Padfield v Minister for Agriculture, Fisheries and Food* [1969] AC 997.

<sup>59</sup> *The Law Society of Lesotho v The Chief Justice* (CIV/APN/149/2010) <https://lesotholii.org/ls/judgment/high-court/2012/6/>, accessed on 27 January; *Chalatse v The Acting Chief Justice* C of A CIV /63/2014 <https://lesotholii.org/ls/judgment/court-appeal/2015/19/>, accessed on 27 January 2019; *Commander, Lesotho Defence Force v Mareka* C OF A (CIV) 27/15 <https://lesotholii.org/ls/judgment/court-appeal/2015/23/>, accessed on 21 January 2019.

<sup>60</sup> [1948]1 KB 223.

<sup>61</sup> *Ibid* 590.

<sup>62</sup> C of A (CIV) NO.52/2016. See also the case of *Koatsa v National University of Lesotho* LAC (1985–1989) 335.

<sup>63</sup> *Ibid* para 20.

<sup>64</sup> 1928 AD 220.

must be inferred from it such as *mala fides*, ulterior motive or failure to properly apply one's mind.

Although the test appears objective, in practice it admits of subjectivity. It largely depends on the judge being presented with it as the basis for seeking judicial review. Perhaps, this is one of bases for the argument sustained in this chapter that the problem of subjectivity and elasticity may be mitigated by codifying these grounds of review in a statute.

### (iii) *Procedural impropriety*

The sense in which the court used 'procedural impropriety' in the *CCSU* case is double-pronged. Firstly, it relates to failure to observe the common-law rules of natural justice or procedural fairness. Secondly, it relates to failure to observe procedural rules that have been laid down expressly by the statute 'even where such failure does not involve any denial of natural justice'.<sup>65</sup> A good part of Lesotho's administrative litigation is based on this ground, particularly the violation of the rules of natural justice; namely, *audi alteram partem* (right to be heard) and *nemo iudex in causa sua* (rule against bias).<sup>66</sup> While initially the superior courts were particularly rigid about the application of the rules of natural justice,<sup>67</sup> they have since joined a discernible movement both in England and South Africa away from an inflexible application of the rules of natural justice to the requirement of fairness based on a consideration of all the circumstances of each case. The flagbearer of this movement is the fairly old decision of *Russell v Duke of Norfolk*<sup>68</sup> where the court emphatically showed that 'the requirements of natural justice must depend on the circumstances of the case ... Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used'.<sup>69</sup>

In Lesotho the trailblazer for this movement is the Court of Appeal decision in the case of *Matebesi v Director of Immigration (Matebesi)*.<sup>70</sup> *Matebesi* was later followed in *President of the Court of Appeal v Prime Minister*.<sup>71</sup> This is the case in which the Prime Minister had kick-started the process of removing the President of the Court of Appeal by appointing the tribunal in terms of section 125 of the Constitution to investigate his conduct. The President of the Court of Appeal (applicant) contended that before the Prime Minister could appoint the tribunal, he ought to have been given an opportunity to make representations in terms of the principle of *audi alteram partem*. Indeed, he was not given an opportunity to make such representations. The Prime Minister's contention was that since the tribunal was going to give

<sup>65</sup> *Supra* 590.

<sup>66</sup> The classical case on the rule against bias is *R v Sussex Justices ex p. McCarthy* [1923] All ER 233.

<sup>67</sup> *Koatsa* case (*supra* note 62) 335.

<sup>68</sup> [1949] 1 All ER 109.

<sup>69</sup> *Ibid* 118.

<sup>70</sup> 1997-98 LLR 455.

<sup>71</sup> *Supra*. The approach was also followed in several other decisions of the court of Appeal such as *Mokoena supra, Khasu v Thabane* C of A (CIV) 46 of 2016 available at <https://lesotholii.org/ls/judgment/court-appeal/16/25>, accessed on 25 January 2019.

the Applicant a hearing through its proceedings, there was no need for a hearing prior to appointment of the tribunal. The court said,

I agree that the strict requirements of the *audi* principle were not complied with ... But this does not mean that the appellant is correct in his contention that the consequences of the failure to afford him a hearing vitiated the decision because it is based on an over simplification of what the right to fair procedure—which includes the *audi* principle—requires. As explained by Gauntlett JA in his earlier quoted dictum from *Matebesi*, the requirements of fair procedure, which includes the *audi* principle, have ‘more recently mutated to an acceptance of a more supple (sic) and encompassing duty to act fairly.’<sup>72</sup>

The emerging approach is laudable because it moves from the rigidity of the orthodox approach.<sup>73</sup> But new risks have come with the new approach and the superior courts in Lesotho seem not to be coping with them. After the decision in *President of the Court of Appeal*, a new administrative mischief emerged. Administrators no longer go through the rigid process of hearing; they just write a letter to a person concerned, requesting to ‘show cause why’ a decision may not be taken. Almost invariably, this ‘show-cause-why-letters’ signal a premeditated decision on the side of the administrator. This trend seems to be surging in Lesotho’s administrative practice and it is a new threat to administrative justice.

#### (iv) *Disproportionality*

This ground is fairly uncommon in Lesotho’s administrative law. The only time the court of Appeal used it is in the case of *Roma Taxi Association v Officer Commanding Roma Police*.<sup>74</sup> The Court accepted that disproportionality is a ground for review in Lesotho. It warned that, ‘[t]he judiciary will intervene in the exercise of administrative power or discretion, if such exercise descends into illegality, procedural impropriety, irrationality and disproportionality, which has been fashioned as a new ground’. The content of this ground is yet to be developed in Lesotho. In the same *Roma Taxi Association* case, the court only hinted at its content by referring with approval to the Zambian case of *Attorney General v Roy Clarke*.<sup>75</sup> This is the case in which the Supreme Court reviewed the decision to deport a British national who had authored a satirical article calling the President of Zambia a ‘foolish king’. The deportation was quashed by both the High Court and Supreme Court as it was found to be disproportionate to separate him from his family for writing a ‘silly’

<sup>72</sup> At Paras 18–19.

<sup>73</sup> The merits of the new approach are best canvassed by Hoexter (*supra* note 34) at 362 as thus: ‘... [P]rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all-important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.’

<sup>74</sup> C OF A (CIV) 20/2015 available on <https://lesotholii.org/ls/judgment/court-appeal/16/6>, accessed on 5 January 2019.

<sup>75</sup> 2008 Zambian Law Reports 148.

article. The decision buttresses what Hoexter contends, that ‘proportionality may be defined as the notion that one may not use a sledgehammer to crack a nut’.<sup>76</sup>

In a situation where administrative law is based on the common law, like in Lesotho, it remains to be seen whether disproportionality will grow as an independent ground of review or as an aspect of ‘irrationality’. In South Africa, Hoexter contends that it is one of the aspects of (un)reasonableness in terms of the country’s administrative law statute.<sup>77</sup>

#### (v) *Legitimate expectation*

One of the most popular grounds of administrative law review in Lesotho is the notion of legitimate expectation. The superior courts in Lesotho readily review administrative decisions if they go against legitimate expectation—either procedurally or substantively. The two aspects of the doctrine are crisply distinguishable in that substantive expectation relates to an expectation of a favourable decision, while procedural expectation relates to an expectation that a certain procedure will be followed before a decision is taken.<sup>78</sup> The doctrine has been imported from two most influential jurisdictions on Lesotho’s administrative law—England<sup>79</sup> and South Africa.<sup>80</sup> While the courts in Lesotho are generally agitated by the doctrine of legitimate expectation, its real purport in the country’s administrative law seems nebulous. The courts apply it inconsistently. In the case of *Banyane v Commissioner of Correctional Services*,<sup>81</sup> the court was seized with a situation where the Ministry of Public Service had issued a circular which places holders of bachelor’s degrees on ‘Grade F’ of the government grading system. The applicant was a bachelor’s degree holder who was given a demotion for misconduct and his salary was accordingly reduced commensurate with the new lower rank. His contention was that based on the Circular from the Ministry of Public Service, he had a legitimate expectation that as the holder of a bachelor’s degree, his demotion would not affect his salary grading. The High Court granted this contention. The Court reasoned that ‘the circular affects all Public Servants and has since it was passed, become a rule of practice that carries with it a legitimate expectation. Its legality has never been challenged by the respondents in the past and they have acted on its authority.’

This approach was followed in the case of *Mahetlane v Commissioner of Police*.<sup>82</sup> Contrarily, the Court of Appeal in the case of *The Principal Secretary-Ministry of Tourism Environment And Culture v Makha*<sup>83</sup> refused to recognise the same ‘Circular’

<sup>76</sup> *Supra* at 109.

<sup>77</sup> See s 33(1) of the Promotion of Administrative Justice Act 3 of 2000.

<sup>78</sup> *Transvaal v Traub* 1989 (4) SA 731.

<sup>79</sup> *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904.

<sup>80</sup> *Traub* case (*supra* note 78).

<sup>81</sup> CIV/APN/80/2008 available on <https://lesotholii.org/ls/judgment/high-court/2010/13/>, accessed on 27 January 2019.

<sup>82</sup> CIV/APN/76/2011 available on <https://lesotholii.org/ls/judgment/high-court/2011/151/>, accessed on 27 January 2019.

<sup>83</sup> C of A (CIV) 35/2012 available on <https://lesotholii.org/ls/judgment/court-appeal/2013/5/>, accessed on 27 January 2019.

as the basis for legitimate expectation for promotion into 'Grade F'. The applicants, like in *Mahetlane* case, had gone to school to improve their qualifications. After school they sought that their salary scale to be placed on 'Grade F'. For some reason, the Court of Appeal refused and reasoned that the expectation was unreasonable. It held that '[i]t cannot be overemphasised that to be legitimate, an expectation must be reasonable. And if it is said to be based on a document, the terms of that document have to be properly interpreted and interpreted in context.'

Similarly, in the case of *Ministry of Local Government v Moshoeshoe*,<sup>84</sup> the Court of Appeal refused to grant an application for review in a situation where an acting chieftainess was removed from her acting position on the basis that she was not in the first instance a rightful successor to the office. Her contention was that at least she had a legitimate expectation that she would be given a fair hearing before a decision could be taken to remove her. The court characterised the expectation as 'illegitimate'.<sup>85</sup> The court found that '[a]n illegality committed in the past cannot ... be taken as a basis for continuing it in the future'.<sup>86</sup> Rather bizarrely, the court held that 'the *audi alteram partem* rule has no application in this case'.<sup>87</sup>

What these cases demonstrate is that indeed the doctrine of legitimate expectation is an impeccable aspect of administrative law of Lesotho. They also support the overarching observation herein that the development of administrative law in Lesotho is rather a chaotic enterprise; it lacks consistency and certainty.

#### 4. EXCLUSION OF JUDICIAL REVIEW (OUSTER CLAUSES)

The Constitution of Lesotho is animated by the principle of constitutional supremacy. The fundamental presupposition under this kind of constitutional design is that the courts of law have unlimited powers to test the constitutionality of every action by any branch of government. However, the contrary is the case in Lesotho; the country has both constitutional and statutory clauses meant to oust judicial review. At the constitutional level, the Constitution has several ouster clauses that exclude the jurisdiction of the courts. The first, and most critical ouster clause is section 80(5) of the Constitution which excludes the courts from inquiring into the propriety of legislative process. The section provides that the certificate of the Speaker of the National Assembly certifying the propriety of the legislation process 'shall be conclusive for all purposes and shall not be questioned in any court'. The judicial opinion in Lesotho is divided about the legal effect of this clause. In the case of *Development for Peace Education v Speaker of the*

<sup>84</sup> C of A (CIV) 15/09 available on <https://lesotholii.org/ls/judgment/court-appeal/2009/29/>, accessed on 27 January 2019.

<sup>85</sup> Ibid para 18.

<sup>86</sup> Para 18.

<sup>87</sup> Para 17. The court held this despite a long list of the decision from the Court of Appeal to the effect that whenever a decision adversely affects the rights another person, the person so affected must be given a hearing. See the cases of *President of the Court of Appeal* (*supra* note 50); *Matebesi* (*supra* note 53); *Koatsa* (*supra* note 62).



*National Assembly*<sup>88</sup> the Constitutional Court refused to pierce through the clause to investigate whether in the enactment of the Human Rights Commission Act,<sup>89</sup> the National Assembly complied with section 80(3) of the Constitution. The court dismissed the application and reasoned that:

It should at all times be recognised that the Parliament of Lesotho has the power under the Constitution to make laws and to regulate its own procedure and processes and in particular to make rules for the orderly conduct of its own proceedings. This is a fundamental aspect of its legislative power vested in it by the Constitution and one that is indeed expressive of the doctrine of ‘*separation of powers*.’<sup>90</sup> (Emphasis in original.)

Surprisingly, in the most recent decision in *Mokhothu v Speaker of the National Assembly*,<sup>91</sup> the same court categorically demonstrated its willingness to pierce through the ouster clause if the law has been violated. In this case the applicant was deprived of his status as the official leader of opposition after his party lost one Member of Parliament to the government. The Speaker did this despite the fact that the other opposition parties had written to assure the Speaker that they support the first applicant as the official leader of opposition. The decision of the Speaker was done by way of a ruling to a point of order that was raised by the Minister of Forestry.<sup>92</sup> The defence of the Speaker was that the ruling is an internal parliamentary proceeding and it was protected by privilege as codified by the ouster clause in section 80(5) of the Constitution. The court refused and upheld the application. It reasoned that:

Parliament is a creature of the Constitution. It is conferred with powers under section 81 (1) to make rules to regulate its own procedure and orderly conduct in each House. That power is ‘subject to the provisions of this Constitution’. These quoted words indicate that the rule-making power of Parliament is not absolute but limited by the provisions of the Constitution. Thus, this Court has jurisdiction and power to declare the Speaker’s rulings, rules, practice or usage of Parliament invalid if inconsistent with or violative of any part of the Constitution.<sup>93</sup>

<sup>88</sup> *Development for Peace Education v Speaker of the National Assembly* CC 5/2016(unreported).

<sup>89</sup> Act 2 of 2016.

<sup>90</sup> *Development for Peace Education* (supra note 88) para 21. See the same approach being rehashed in *Transformation Resource Centre v Speaker of the National Assembly* CC No. 4 of 2017(unreported).

<sup>91</sup> *Mokhothu v Speaker of the National Assembly*. Also in the case of *All Basotho Convention v The Speaker of the National Assembly* CIV/APN/406/2016 (unreported), the court declared that the Speaker did not have the power to make a pronouncement of the vacancy of a seat of Parliament. The Speaker in casu, had declared vacancies in the National Assembly in a situation where certain members of parliament failed to attend the necessary number of sittings of the National Assembly as provided for in s 60(1)(g) of the Constitution. The case did not deal with the review of internal proceedings of parliament per se, but it is one of the rare occasions in Lesotho where the judiciary stood firm to review the decisions of parliament or its officials.

<sup>92</sup> The Minister rose on a point of order and said, ‘... I consider that one quarter of this House’s Membership consists of 30 Members, what then with the recent drastic changes (i.e. floor-crossing)? To me, there is no political party with the 1/4 (30 Members) majority to qualify for the Official Leader of the Opposition. Can you kindly guide us on the proper procedure in this regard?’.

<sup>93</sup> *Mokhothu v Speaker of the National Assembly*, para 14. For this approach the Court relied on the Namibian Supreme Court decision in *Federal Convention of Namibia v Speaker, National Assembly of Namibia* 1994(11) SA 1 77(NSC) and the South African Supreme Court Decision in *Speaker of the National Assembly v De Lille* 1999(4) SA 863 (SCA).

Section 91(5) is another constitutional ouster clause and it provides that ‘where the King is required by this Constitution to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be enquired into in any court’.

At the statutory level, there are pieces of legislation that still oust the jurisdiction of the courts from inquiring into the decisions of administrative tribunals. The most recent legislation is the Insurance Act of 2014.<sup>94</sup> The Act provides that any person who is aggrieved by any decision of the Commissioner of Insurance may refer such grievance to the tribunal created by Financial Institutions Act,<sup>95</sup> and the decision of the tribunal ‘shall be final’.<sup>96</sup>

## 5. STANDING

The principles of standing in Lesotho are still based on the common-law doctrine of *locus standi in judicio*. This principle requires a person to demonstrate a direct and substantial personal interest before he or she could bring a case to court. The plausible justification for the doctrine of *locus standi in judicio* is best located within private law where a person may not justifiably be permitted to be a ‘busy-bee’ about the private affairs of other people. In public law the justification is fast losing its currency. However, the Constitution of Lesotho still retains this common-law approach to standing (*locus standi in judicio*). The Constitution is very express that if any person alleges that any provision in the Bill of Rights ‘has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person),’<sup>97</sup> such person may approach the High Court for redress. The first case to affirm this position is the case of *Lesotho Human Rights Alert Group v Minister of Justice & Human Rights*.<sup>98</sup> This is the case in which a non-governmental organisation instituted an action seeking declaratory relief that the continued detention of certain awaiting trial prisoners was unlawful. The Court of Appeal refused to grant the declarator on the procedural ground that the *actio popularis* is not part of the Roman-Dutch common law which is part of Lesotho law. This approach has been followed indiscriminately in private as well as in public litigation in Lesotho. In recent times there has been strong criticism of the approach as it relates to public litigation. The criticism notwithstanding, the Court of Appeal continues to be adamant that as long as the Constitution cherishes the common-law notion

<sup>94</sup> Act 12 of 2014.

<sup>95</sup> Act 3 of 2012.

<sup>96</sup> Section 132(2) of the Insurance Act, 2014. Similarly, s 29 of the Arbitration Act (Act 12 of 1980) provides that the arbitration awards are generally final and shall not be subject to appeal. In the case of *M & C Construction International v Lesotho Housing and Land Corporation* C of A (CIV) 9 of 2015 available on <https://lesotholii.org/ls/judgment/court-appeal/16/4#undefined>, accessed on 28 January 2019, the Court of Appeal confirmed that the courts of law will ordinarily be slow to interfere with arbitration awards.

<sup>97</sup> Section 22(1) of the Constitution of Lesotho, 1993.

<sup>98</sup> LAC (1990–1994) 652.

of *locus standi in judicio*, rules of standing in Lesotho will remain narrow and illiberal.<sup>99</sup> The most recent decision of the Court of Appeal to re-affirm this position is the case of *Mosito v Letsika*.<sup>100</sup> In this case the respondents were individual practising lawyers who had approached the court, amongst others, seeking to challenge the appointment of the first appellant as the President of the Court of Appeal. Their standing was brought into question both in the High Court and in the Court of Appeal. The Court of Appeal was very forthright that applicants did not have *locus standi*. Referring specifically to standing to challenge administrative decisions, the court reasoned that,

The justification for standing requirement lies in the need to limit challenges to administrative acts, which is predicated on the need to limit the challenge to administrative decision-making to genuine cases of grievance and to avoid unnecessary interferences in the administrative process by those whose objectives are not authentic. This is the philosophy underlying section 22(1) of the Constitution of Lesotho.<sup>101</sup>

In the exceptional case of *Lesotho Police Staff Association (LEPOSA) v Commissioner of Police*,<sup>102</sup> the High Court permitted the police association to litigate in a case where it was challenging promotions in the police service that were allegedly unlawful. The court rejected the procedural point of *locus standi* on the basis of the principle of legality. Although the *LEPOSA* case is the most plausible and progressive decision in contemporary jurisprudence of the superior courts on standing in Lesotho, it may not command much authority in view of section 22(1) of the Constitution and the approach taken by the Court of Appeal on the subject.<sup>103</sup>

## 6. ADMINISTRATIVE OVERSIGHT INSTITUTIONS

### (a) Ombudsman

One of the institutions of administrative justice in Lesotho is the Ombudsman. The ombudsman is a creature of the Constitution and statute.<sup>104</sup> The Constitution creates the ombudsman as an independent office which in the exercise of its functions 'shall not be subject to the directions or control of any other person or authority'.<sup>105</sup> The principal function of the ombudsman is to investigate an action taken by any department of government,<sup>106</sup> local authority<sup>107</sup> or statutory body<sup>108</sup> in 'the exercise of the administrative functions of that officer or authority in cases where

<sup>99</sup> *Phoofolo v The Right Honourable Prime Minister* (C OF A (CIV) 15/2017 available on <https://lesotholii.org/node/10843>, accessed on 27 January 2019).

<sup>100</sup> C OF A (CIV) 9/2018 available on <https://lesotholii.org/node/11111>, accessed on 25 January 2019.

<sup>101</sup> *Ibid* para 32.

<sup>102</sup> The Ombudsman Act 9 of 1996.

<sup>103</sup> In cases such as *Human Rights Alert Group* (*supra* note 98), *Phoofolo* (*supra* note 99) and *Mosito* (*supra* note 100).

<sup>104</sup> Section 134 of the Constitution of Lesotho, 1993 and The Ombudsman Act 9 of 1996.

<sup>105</sup> Section 135(4) of the Constitution of Lesotho 1993.

<sup>106</sup> *Ibid*, s 135(2)(a).

<sup>107</sup> *Ibid*, s 135(2)(b).

<sup>108</sup> *Ibid*, s 135(2)(c).

it is alleged that a person has suffered injustice in consequence of that action'.<sup>109</sup> It would seem that the recommendations of the Ombudsman are not binding. The constitution provides that the Ombudsman makes investigations on the grievances presented him and make a report to parliament. The only two conditions placed by the constitution are that, (a) it must show 'a statement of the action if any, taken by the officer or authority concerned as a consequence of such investigation', and, (b) 'a recommendation as to what remedial action, including the payment of compensation, should be taken'.<sup>110</sup> Unlike in South Africa where there is legion of authority about the nature of the powers of the Public Protector,<sup>111</sup> in Lesotho there is a dearth of decided cases on the juridical nature of the remedial action recommended by the ombudsman. The main bet for the Ombudsman is that parliament will enforce its recommendations. The only shortfall with the parliamentary avenue is that the reports of the Ombudsman are never tabled and discussed in parliament.<sup>112</sup> This is contrary to the prescription of the Ombudsman Act of 1996 to the effect that upon receiving the report of the Ombudsman, the President of the Senate and the Speaker of the National Assembly shall table a copy of the annual report to 'Parliament as soon as possible when Parliament is in session'.<sup>113</sup>

The problem of non-compliance with the Ombudsman recommendations by public functionaries is therefor still rife. In the 2013/14 Annual Report, the Ombudsman lamented that the main reason for non-compliance with the recommendations is that,

... [with] some agencies the understanding is that the Ombudsman seems to interfere with their exercise of powers under their specific legal frameworks. The assumption is that their legal powers run parallel to those of the Ombudsman therefore, the latter need not question how they exercise such powers.<sup>114</sup>

The problem of the juridical nature of the remedial action of the Ombudsman remains the greatest handicap in the work of the Ombudsman an agency of administrative agency in Lesotho.

### **(b) Parliamentary oversight**

The Parliament in Lesotho is one of the mechanisms of oversight over the exercise of administrative powers. The Constitution of Lesotho embodies both collective and individual responsibility of ministers to Parliament.<sup>115</sup> This function is largely dis-

<sup>109</sup> Ibid, s 135(1)(a).

<sup>110</sup> Ibid, s 135(3).

<sup>111</sup> *Minister of Home Affairs v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA); *South African Broadcasting Corporation SOC Ltd v Democratic Alliance* 2016 (2) SA 522 (SCA); *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC); *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

<sup>112</sup> See Ombudsman Annual Report 2014/2015 at 5, available on <http://www.ombudsman.org.ls/wp-content/uploads/2018/05/Report-2014-2015.pdf>, accessed on 23 January 2017.

<sup>113</sup> Section 16(2) of the Ombudsman Act 9 of 1996.

<sup>114</sup> The Ombudsman Annual Report 2012/13 at 7, available on [www.ombudsman.org.ls/wp-content/uploads/2013/03/Report-2012-13.pdf](http://www.ombudsman.org.ls/wp-content/uploads/2013/03/Report-2012-13.pdf), accessed on 27 January 2019.

<sup>115</sup> Section 88 of the Constitution.

charged through the question-and-answer mechanism and the committee system of parliament. The Parliament of Lesotho is largely limited in its capacity to discharge oversight functions on the executive due largely to the Westminster model of inter-branch relations in Lesotho.<sup>116</sup> The system of government in Lesotho is largely parliamentary wherein all members of cabinet originate from, and remain members of, one of the chambers of Parliament.<sup>117</sup> Instead of this design being conducive to parliamentary oversight, as it is theoretically intended to be, it has weakened the oversight of parliament. The business of Parliament and the political powers of Parliament largely radiate from cabinet. In that way, the Parliament becomes inherently limited.

Nevertheless, the law in Lesotho does not only empower Parliament to delegate its powers but it also empowers Parliament to scrutinise delegated legislation. In terms of the law, subordinate legislation—regulations, rules, or by-laws—must be tabled before the National Assembly within 15 sitting days of its publication in the Gazette.<sup>118</sup> If the subordinate legislation is not tabled accordingly, it ceases to become law.<sup>119</sup> Subordinate law does not follow the usual bill route; once it has been tabled before the House it is referred to the relevant portfolio committee which may recommend approval or disapproval.

So in a way, the Parliament has some semblance of oversight over the subordinate legislation. That notwithstanding, the overall problem of executive dominance is the major handicap for parliamentary oversight in Lesotho.

## 7. CONCLUSION

The forgoing discussion has demonstrated that administrative law in Lesotho, and perhaps administrative justice in general, is in a state of uncertainty. It is following two jurisdictions—England and South Africa—that are moving at very high speed, so much that it can no longer keep pace. The English common law is so much trying to keep pace with other developments in continental Europe while South Africa administrative law is developing within two peculiar strictures—the Constitution and the statute.

Be that as it may, it would seem that judicial review continues to be the centrepiece of administrative law in Lesotho. Its traditional grounds transplanted from the English case of *CCSU* are evolving, albeit not smoothly. It remains to be seen how in future the courts will treat proportionality as ‘the new ground’—whether it will be treated as an aspect of rationality or it will be treated as a stand-alone ground. And if it stands alone, it will have to be decided what its content will be. It may be recommended that proportionality be treated as part of rationality where

<sup>116</sup>Kopano Makoa ‘Strengthening parliamentary democracy in SADC’ *Lesotho Country Report* (SAIIA, 2004).

<sup>117</sup>Section 87(4) of the Constitution of Lesotho, 1993.

<sup>118</sup>Section 27A (2).

<sup>119</sup>Section 27A (3).

the court will assess whether the administrative action taken by the public functionary is rationally proportionate to the alleged breach.

Another nagging aspect of administrative law in Lesotho is the question of standing that is disturbingly lagging behind contemporary trends in public law. The insistence on the private-law-rooted notion of *locus standi* is a real setback for administrative law development in Lesotho. The change to this approach will entail a reform of the entire bill of rights in the Constitution and its enforceability clause. But the rule of law and legality avenues used by courts in cases such as *LEPOSA* may be recommended in the meantime.

In summary, the paper recommends a systemic review of the state of administrative law with a view to embed it in the Constitution and to enhance certainty. This twin objective may be achieved by constitutionalising the right to administrative justice and by enacting a statute to implement this right. Such codification of the right to administrative justice may not necessarily be a panacea against maladministration but at least it is likely to bring certainty to the discourse.

## CHAPTER 2

# The State of Administrative Justice in Zambia

FELICITY KAYUMBA KALUNGA\* AND O'BRIEN KAABA†

### ABSTRACT

The chapter provides an overview of Zambia's administrative justice system. It discusses the salient features of the administrative justice system through the analysis of relevant legislation and case law. Although the Constitution of Zambia does not guarantee a right to fair administration, it contains provisions which empower courts to engage in administrative law review. Judicial review has become the main means through

which people in Zambia seek administrative justice. The applicable law in such reviews is English common law which regulates both the grounds of review, procedures to be followed, and appropriate remedies. In addition to judicial review, the chapter also discusses the role played by statutory appeals bodies and the office of the Public Protector, in facilitating access to administrative justice in Zambia.

## 1. INTRODUCTION

Citizens interact with public institutions daily. The State provides many services that citizens depend on for living orderly and meaningful lives. In providing these services, public institutions and officers exercise discretion in designing and executing policies. When the policies and services are planned and implemented judiciously and in good faith, the citizens are assured of a fair and responsive public administration system. However, when the services are delayed, or decisions are made arbitrarily and capriciously, this will have a detrimental effect on the welfare of the people. It will also impact negatively on the efficiency and effectiveness of the service provision and public administration. It is the purpose of administrative justice to provide mechanisms for effective oversight of the public administration systems in order to ensure that administrative authority is exercised in a lawful manner, and that people are not adversely affected. Where people's rights and interests are adversely affected, adequate remedies should be provided.

This chapter provides an overview of the salient features of Zambia's administrative justice. It is divided into five sections. The first section is an introduction and the second discusses the nature as well as the status of administrative law in Zambia. The third section discusses judicial review as a mechanism for enforcing administrative justice in Zambia, while the fourth section of the chapter considers

\* LLB (UNZA) LLM (UCT). Lecturer, School of Law, University of Zambia.

† LLB (London) LLM (UNZA) LLD (UNISA). Lecturer, School of Law, University of Zambia.

alternatives to judicial review. The fifth and final section is the conclusion, which ties together the key arguments advanced in this chapter.

## 2. THE NATURE AND STATUS OF ADMINISTRATIVE LAW

The administrative justice system in Zambia consists of the common-law mechanisms of enforcing administrative justice. These are judicial review as well as non-judicial mechanisms in the form of constitutional oversight bodies such as the public protector and statutory tribunals. There is no constitutional right to fair administration<sup>1</sup> nor is there legislation that specifically provides for the right to administrative justice. In order to be considered as fair or just, the exercise of public administrative powers must be lawful and respectful of the procedural rights of persons who are affected by the exercise of such powers.<sup>2</sup> The right to fair administration is usually justified on the ground that it is intended to remove the 'indifference of the law regarding the exercise of discretionary powers.'<sup>3</sup> The right to fair administration seeks to introduce a paradigm shift from indifference to an establishment of entitlement to fair administration. This entails holding public officials accountable not only in terms of adherence to fair procedures, but also in relation to the substance of their decisions.

The right to fair administration entitles citizens 'to expect a certain standard of behavior [conduct] from public powers.'<sup>4</sup> At a minimum, this requires the government to act consistently and diligently, and to communicate efficiently and effectively to the concerned persons. Further, the public authorities must act with good faith and ensure that public resources are expended efficiently and in an accountable manner.<sup>5</sup> The right to fair administration is intended to foster a culture of accountability throughout the public decision-making cycle. Public officials must be answerable for both the process of decision making and the substantive content of their decisions.

Although the Constitution of Zambia<sup>6</sup> does not provide for a justiciable right to fair administration, it prescribes standards in the form of values and principles that should guide the public administration. Article 8 of the Constitution sets out national values and principles which include 'democracy and constitutionalism;

---

<sup>1</sup> Migai Akech argues that this is a dynamic concept expanding as societal and judicial attitudes change, but at its minimum, it includes reasonable and expeditious action and subsumes the concept of proportionality in public decision making. See Migai Akech *Administrative Law* (2016) 438.

<sup>2</sup> Mark Elliot & Robert Thomas *Public Law* 3rd ed (2017).

<sup>3</sup> Juli Ponce 'The Right to Good Administration and the Role of Administrative Law in Promoting Good Governance' available at <http://www.law.com>, accessed on 2 January 2019.

<sup>4</sup> Elisabetta Lanza 'The Right to Good Administration in the European Union: Roots, Rationales and Enforcement in AntiTrust Case Law' available at [http://www.academia.edu/1345747/The\\_Right\\_to\\_Good\\_Administration\\_in\\_the\\_European\\_Union\\_Roots\\_Rationales\\_and\\_Enforcement\\_in\\_Antitrust\\_Case-Law](http://www.academia.edu/1345747/The_Right_to_Good_Administration_in_the_European_Union_Roots_Rationales_and_Enforcement_in_Antitrust_Case-Law), accessed 12 February 2019.

<sup>5</sup> *Ibid.*

<sup>6</sup> The Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act 2 of 2016 (The Constitution of Zambia).



human dignity, equity, social justice, equality and non-discrimination; good governance and integrity.’ In terms of article 9, these national values and principles apply to the interpretation of the Constitution, and the enactment and interpretation of laws.

Furthermore, Article 173 sets out guiding values and principles of the public service and these include effectiveness, impartiality, fairness, and the equitable provision of services, public participation and accountability. However, these values and principles are not enforceable in a court as was held by the High Court in *Gordon Mwewa and Others v The Attorney General and Another*.<sup>7</sup> In this case, the Court held that ‘national values and principles ... cannot be taken as a forceful embodiment ... because as aspirations, they do not attach any immediate obligation on the Government to implement them.’<sup>8</sup> Therefore, aggrieved persons have to rely on common-law remedies (except where there are prescribed statutory remedies, some of which are discussed below) to seek redress in cases involving maladministration.

Although the Constitution of Zambia does not provide for a right to fair administration, previous constitution-making processes reveal that the right to fair administration has been recommended for inclusion in the bill of rights. The Zambian constitution has undergone four major amendments since the country gained its independence from Britain in 1964. The constitution was amended in 1973, 1991, 1996 and 2016. A review of the various draft constitutions and concomitant reports leading up to the highlighted amendments sheds light on the constitutional aspirations of the people, and in this case, the desire of the people to have a justiciable right to fair administration.

The right to fair administration first appeared in the 1995 draft constitution. It provided:

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law. Every person shall have the right to be furnished with reasons in writing for administrative action which affects any of his or her rights or freedoms unless the reasons for such action have been made public.

Any person aggrieved by the exercise of any administrative act or decision shall have the right to seek redress before a Court or other tribunal.<sup>9</sup>

By including the right to fair administration, the Constitutional Review Commission noted that as a result of increased complexities of public administration, the relationship of citizens with the state tended to widen.<sup>10</sup> As a result, this led to increased instances where bureaucracy routinely impaired the people’s ability to obtain public services or where these were only obtained after inordinate

<sup>7</sup> Unreported case no 2017/HP/204. In this case, the Petitioners asked the High Court to declare the repealed Mental Disorders Act unconstitutional. The Petitioners urged the court to consider constitutional values and principles when construing provisions of the challenged law.

<sup>8</sup> Ibid at J24.

<sup>9</sup> Draft Constitution of the Republic of Zambia 1995, clause 40.

<sup>10</sup> Report of the Constitutional Review Commission 1995, para 7.2.10.

and unjustified delays.<sup>11</sup> To redress this, the Commission included the clause in the draft constitution entitling individuals to fair administration in order to provide individuals with a right which they could rely on to seek protection and or redress against administrative inefficiencies.<sup>12</sup> Although the focus of the provision was primarily on procedural fairness, it also provided for a substantive right to seek redress whenever a person was aggrieved by the exercise of administrative authority in the form of an act or decision.

The right to fair administration was also included in all subsequent draft constitutions but has not been included in the final provisions. The right was, however, drafted more narrowly in the most recent constitution amendment process of 2016, where it simply read: ‘A person has the right to administrative action that is expeditious, lawful, reasonable and procedurally fair.’<sup>13</sup> It left out the right of individuals adversely affected by administrative action to be furnished with written reasons. The Draft Bill of Rights was put to a referendum on 11 August 2016 but failed to garner the requisite minimum support in order to pass.<sup>14</sup> Although the referendum failed to pass, the inclusion of the clause on the right to fair administration highlights the fact that it commands general support and will most likely be included in future constitutions.

### 3. JUDICIAL REVIEW IN ZAMBIA

In the absence of a constitutional right to administrative justice, the common-law remedy of judicial review has become the main avenue for controlling the administrative authority of the government. Courts derive their authority to control administrative authority from their common-law jurisdiction to safeguard human rights and protect the Constitution of Zambia and the rule of law. The court that is mandated with original jurisdiction to hear judicial review applications is the High Court.<sup>15</sup> The following section discusses the legal authority for judicial review, the applicable law, scope of and amenability to judicial review, grounds and remedies for judicial review and the role of Parliament in setting standards for rule making and application.

#### *(a) Legal authority for judicial review*

The applicable law in judicial review matters is the common law which is largely shaped by the jurisprudence and legislative changes in the United Kingdom.

---

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Draft Bill of Rights 2016, clause 31. The Draft Bill of Rights was put to a referendum on 11 August 2016 but failed to pass. It was annexed to Statutory Instrument No.35 of 2016.

<sup>14</sup> The referendum was held on the same day as general elections. The fact that the two dominant parties, the Patriotic Front (PF) and the United Party for National Development (UPND), took opposing views turned the process into a partisan political issue and, therefore, destined it to fail for want of national consensus.

<sup>15</sup> The Constitution of Zambia (n 6) Article 134.

Some authorities are highlighted further below, beginning with the constitutional context.

(i) *Constitutional provisions that support judicial review*

The Constitution of Zambia provides for the separation of governmental powers between the Executive, Legislature and Judiciary. The legislative authority of the state vests in Parliament which consists of the President and the National Assembly (NA).<sup>16</sup> Article 91(2) of the Constitution vests the executive authority of the state in the President. It further states that the executive authority 'shall be exercised by the President or through public officers or other persons appointed by the President.' Article 266 of the Constitution defines a public officer as 'a person holding or acting in a public office, but does not include a State officer, councillor, a constitutional office holder, a judge and a judicial officer.' A State officer is defined as a person holding or acting in a state office, that is to say, 'the office of the President, Vice President, Minister and Provincial Minister.'<sup>17</sup> Article 266 of the Constitution also defines a constitutional office as 'the office of the Attorney-General, Solicitor-General, Director of Public Prosecutions, Public Protector, Auditor General, Secretary to the Cabinet, secretary to the treasury and Permanent Secretary.'<sup>18</sup> Persons defined as State officers or constitutional officers are exempted from the definition of public officers through whom the President may exercise executive functions, unless they have been appointed to perform executive functions by the President. There is no jurisprudence yet on the significance of the definition of public officer as it relates to the scope of and amenability to judicial review. The Constitution vests judicial authority in the courts whose functions include 'to hear matters relating to, and in respect of [the] Constitution.'<sup>19</sup>

Another constitutional provision worth mentioning is article 267(4) which provides:

A provision of this Constitution to the effect that a person, an authority or institution is not subject to the direction or control of a person or an authority in the performance of a function, does not preclude a court from exercising jurisdiction in relation to a question as to whether that person, authority or institution has performed the function in accordance with this Constitution or other laws.

This provision empowers Zambian courts to control the exercise of public authority in accordance with the constitution and the law. Courts therefore have the jurisdiction to determine whether the public administrator had power to act and whether the power was exercised lawfully. The provision also means that no governmental action falls outside the scope of judicial review on the ground of illegality. This notwithstanding, the Constitutional Court of Zambia upheld the supposed ouster of courts' jurisdiction in construing the powers of the Director of Public Prosecutions

<sup>16</sup> Ibid article 62(2).

<sup>17</sup> Ibid art 266.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, art 119(2)(b).

to discontinue criminal proceedings in *Milford Maambo and Other v the People*.<sup>20</sup> In that case, the Constitutional Court was asked to determine whether or not, based on the provisions of article 180(4)(c) and (7) of the Constitution, the Director of Public Prosecutions should seek leave of the court when exercising his/her power to discontinue criminal proceedings. Article 180(7) of the Constitution provides that:

The Director of Public Prosecutions shall not be subject to the direction or control of a person or authority in the exercise of the functions of that office, except that the Director of Public Prosecutions shall have regard to the public interests, administration of justice, the integrity of the judicial system and the need to prevent and avoid the abuse of the legal process.

The Constitutional Court held that:

the factors which are set out in clause (7) of article 180, and which the Director of Public Prosecutions must consider, are meant to guide the Director of Public Prosecutions in the performance of that office and are not in any way intended to place a fetter on the discretion that the Director of Public Prosecutions enjoys.<sup>21</sup>

The court further stated that in the absence of an express provision to the contrary, there was ‘no power in the court under article 180(4) of the Constitution to require reasons to be furnished to it by the Director of Public Prosecutions regarding the decision to discontinue criminal proceedings.’<sup>22</sup> Although this was not a judicial review application, the Constitutional Court ruling is directive to lower courts regarding constitutional interpretation of ouster clauses, albeit inconsistent with the interpretational guides and principles set out in articles 8, 9 and 267 of the Constitution stated above.

## (ii) *Law applicable*

In the absence of legislation providing for judicial review, the High Court relies on common-law grounds for review and English procedural law. The English Common Law applies pursuant to article 7 of the Constitution of Zambia which includes laws that extend to Zambia as forming part of the laws of Zambia.<sup>23</sup> The enabling statute for the extension of English laws to Zambia is the English Law (Extent of Application) Act.<sup>24</sup> Section 2 of the Act states that:

Subject to the provisions of the Constitution and to any other written law—

- (a) the common law;
- (b) the doctrines of equity;
- (c) the statutes which were in force in England on 17th August, 1911, being the commencement of the Northern Rhodesia Order in Council, 1911; and

<sup>20</sup> Selected Judgment no 31 of 2017.

<sup>21</sup> *Milford Maambo & Others v The People* at J36.

<sup>22</sup> *Ibid* at J37.

<sup>23</sup> Article 7 of the Constitution of Zambia lists the laws of Zambia as constating of the Constitution; law enacted by parliament; statutory instruments; Zambian customary law which is consistent with the Constitution; and the laws and statutes which apply or extend to Zambia as prescribed.

<sup>24</sup> Chapter 11.

(d) any statutes of a later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which shall apply to the Republic by an Act of Parliament, or otherwise; shall be in force in the Republic.

Zambia therefore uses the English common law in judicial review proceedings, absent a constitutional or statutory provision on the subject. In terms of procedure, the High Court uses the procedure for judicial review in England up to 1999 as provided for by section 10 of the High Court Act<sup>25</sup> which states:

The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice provided that the Civil Court Practice 1999 (the Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia unless they relate to matrimonial causes.

In *Dean Mung'omba & Others v Peter Machungwa & Others*,<sup>26</sup> the Supreme Court pronounced itself on the application of the English procedural law in judicial review proceedings as follows:

There is no rule in the High Court under which Judicial Review proceedings can be instituted and conducted. Thus, by virtue of Section 10 of the High Court Act Chapter 27 of the Laws of Zambia, the High Court is guided as to the procedure and practice to be adopted. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC). Order 53 is comprehensive. It provides for the basis of judicial review: the parties; how to seek the remedies and what remedies are available. When relying on the English procedural law, courts adapt it where necessary to suit the practical situation that the Zambian system permits.

The Constitutional Court has also justified the continued use of the English practice based on the provisions of article 7 of the Constitution. This was stated in the case of *The People and The Patents and Companies Registration Agency Ex Parte Finsbury investment Limited and Zambezi Portland Cement Limited*.<sup>27</sup> In that case, the Constitutional Court was asked to pronounce itself on the justification for the requirement for leave to commence judicial review proceedings under order 53 rule 3 of the Rules of the Supreme Court of England (White Book), and the continued use of the White Book in light of the constitutional provision in article 118(2)(e), which mandates courts to administer justice 'without undue regard to procedural technicalities.' The applicant argued that the requirement to obtain leave to commence judicial review proceedings under order 53 rule 3 of the White Book is contrary to article 118(2)(e) of the Constitution because all matters presented before the court ought to be heard and determined on their merits. The court held that based on the rationale for the requirement for leave to commence judicial review proceedings, it could not be regarded as undue regard to procedural technicality. As

<sup>25</sup> Chapter 27.

<sup>26</sup> (2003) Z.R. 17.

<sup>27</sup> Selected Judgment No. 28 of 2018 (2017/CCZ/R003).

such, article 118(2)(e) of the Zambian Constitution does not proscribe the requirement for leave before issuing judicial review proceedings.

The applicants in that case also argued that the requirement for leave to commence judicial review proceedings had no legal basis considering that the substantive provision requiring leave, namely section 31 of the English Supreme Court Act of 1981, was not applicable in Zambia. The Constitutional Court reiterated the position in *Dean Mungomba* that in the absence of procedural law on judicial review matters, Order 53 of the White Book is part of the Zambian law by virtue of ‘the settled law, ... constitutional provision under article 7(e) of the Constitution as well as statutory prescription by section 10 of the High Court Act.’<sup>28</sup>

Another important point to note concerning the sources of law is the role of customary law in administrative justice. Article 7(d) of the Constitution identifies customary law (which is consistent with the Constitution) as forming part of the laws of Zambia. The Constitution also recognises the governance role of chiefs and traditional institutions by making them part of the local government system. Article 153(2)(c) of the Constitution provides that the Council shall consist of ‘not more than three chiefs representing chiefs in the district elected by chiefs in the district.’ The Council is the unit through which the national and provincial governance functions are implemented on the local level. Chieftaincy is also recognised under part XII of the Constitution. Article 166 provides that ‘[the] institution of the chieftaincy has capacity to hold property in trust for its subjects.’ Article 168(3) provides that the ‘role of a chief in the management, control and sharing of natural and other resources in the chieftaincy shall be prescribed.’ Parliament has yet to enact law to prescribe the exercise of this authority over natural resources by chiefs. Given that customary law is recognised in Zambia, it governs the administrative authority of chiefs in managing and sharing of natural and other resources. Article 167(b) which provides that a chief ‘shall enjoy privileges and benefits bestowed on the office of the chief by or under culture, custom and tradition’ is indicative of the governing role of customary law. This area of the law has however not been developed by case law.

### **(b) Scope of judicial review**

Judicial review is limited to the exercise of public power by public administrators and does not apply to the exercise of private power. In *Ludwig Sondashi v Godfrey Miyanda MP (Sued as National Secretary of the Movement for Multi-Party Democracy)*<sup>29</sup> the appellant was expelled from the respondent political party and sought judicial review praying for a declaration that he had been wrongfully expelled from the party. The Court held that judicial review was the wrong process for challenging the party’s decision. The Court held that the internal affairs of a political party were private matters and as such judicial review was inapplicable against the

<sup>28</sup> *The People and The Patents and Companies Registration Agency Ex Parte Finsbury* at J37.

<sup>29</sup> (1995–1997) Z.R. 1.

political party. The court added, ‘we say this despite the fact that the result in this case would be that the appellant would lose his seat in Parliament, which of course is a public matter, but that fact in itself does not affect the functional status of the tribunal about which the court is being asked to concern itself, that is, as a private tribunal.’<sup>30</sup> There does not seem to be jurisprudence where this principle has been applied in relation to a private institution exercising public functions.

### **(c) Executive discretion and separation of powers**

Courts in Zambia have affirmed their power to control administrative authority even where the power in question relates to executive discretion. In *Attorney General v Roy Clarke*<sup>31</sup> the Supreme Court affirmed that there is nothing like unfettered discretion that is immune to judicial review. The position does not however seem to hold true when the power in question concerns the decision of the President as can be seen from the case of *The People v Attorney General Ex Parte Derrick Chitala*.<sup>32</sup> In that case, the applicant applied for leave to commence judicial review of the decision of the President and his cabinet to adopt the 1996 constitution by the National Assembly, contrary to the recommendation by the Mwanakatwe Constitutional Review Commission which had recommended that the constitution should be adopted by a constituent assembly and national referendum. The applicant sought an order of certiorari to quash the decision of the President and his cabinet to adopt the constitution through the national assembly and mandamus directed at the president and his cabinet ‘to take such measures as may be necessary to ensure that the constitution is debated by and finally determined by a constituent assembly or any other broad based group and subjected to a referendum.’<sup>33</sup> The Supreme Court, during a renewed application for leave to commence judicial review, refused to grant leave to commence judicial review on the ground that there were insufficient grounds to warrant the case to be determined on a full hearing. The court used the three grounds of judicial review, namely, illegality, irrationality and procedural impropriety stated by Lord Diplock in *Council for Civil Service Unions v Minister for Civil Service*<sup>34</sup> to determine whether the case is suitable for a substantive hearing. The court justified its use of grounds of review at the leave stage as follows:

We have to be guided by the three grounds enunciated by Lord Diplock and will not be able to say whether from any other point of view the Government is making a mistake or failing to grasp the opportunity to fashion a constitution that will not be considered as tailor-made for some immediate convenience. It would be wholly improper for the court to make any such political comment or to try and substitute its own view for that of the Government under the guise of judicial review. Our immediate task is to resolve, against the backdrop of the three grounds, whether leave should be granted or if, though

<sup>30</sup> Ibid 2.

<sup>31</sup> (2008) 1 Z.R. 38.

<sup>32</sup> (1995–1997) Z.R 91.

<sup>33</sup> (1995–1997) Z.R 91.

<sup>34</sup> [1985] AC 374.

obviously not frivolous or vexatious, the application is legally hopeless such that we are satisfied that there is no case fit for further investigation at a full inter partes hearing.

After analysing the facts set out in the affidavit in support of the application, the court concluded that the applicant did not disclose a sufficient case for review. On the question whether the decision of the President and his cabinet to adopt the constitution through the national assembly against the recommendation of the Mwanakatwe constitutional review commission was unreasonable, the Supreme Court observed that there was a danger of the court substituting its decision for that of the Executive. The court proceeded to find that since the terms of reference given to the Mwanakatwe constitutional review commission was to recommend a method of adoption on good grounds, it could not find a case suitable for review on grounds of irrationality since the government gave good reasons for proceeding in a different manner to what was recommended by the Mwanakatwe commission. In sum, the court found that although the application was neither frivolous nor vexatious, it was 'legally an untenable application on the face of it' and dismissed the application for leave.<sup>35</sup>

One of the ways by which the court balances its power of review against respect for separation of powers is to refrain from delving into the merits of the decision when called upon to review a decision. The court has stated this position in many cases including *Frederick Jacob Titus Chiluba v The Attorney General*<sup>36</sup> where the Supreme Court emphasized that 'judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made but the decision-making process itself.' In keeping with this principle, courts have refrained from dealing with the merits of the decision in a manner that would amount to substituting their decisions for that of the administrator. The application of this rule is slightly different when courts are called upon to review a decision on the ground of irrationality as is demonstrated in (d) below on grounds of review.

#### **(d) Grounds for judicial review**

The grounds for judicial review have not been developed much from the common-law grounds stated by Lord Diplock in *Council for Civil Service Unions v Minister for Civil Service*,<sup>37</sup> namely, illegality, irrationality and procedural impropriety. Brief explanations on the application of these grounds by the Zambian courts is given using selected examples from case law.

##### **(i) Illegality**

Under this ground, the court would invalidate administrative action that is not authorised by law (pure cases of *ultra vires*), and exercise of administrative power without authority or in excess of jurisdiction given to the administrator. Illegality

<sup>35</sup> *Ibid.*

<sup>36</sup> (2003) Z.R 153.

<sup>37</sup> [1985] AC 374.



also covers situations where the administrator exercises administrative authority with improper motives, takes into consideration factors that ought not to be taken into consideration and or fails to take into consideration factors that ought to be taken into consideration.

In *C & S Investments Limited, Ace Car Hire Limited and Sunday Maluba v The Attorney General*,<sup>38</sup> the appellants challenged the seizure of their various property by the Drug Enforcement Commission purporting to act under powers given to it by Sections 24 and 25 of the Dangerous Drugs (Forfeiture of Property) Act,<sup>39</sup> on the ground that the seizure was illegal because the Dangerous Drugs (Forfeiture of Property) Act had been repealed by Section 49 of the Narcotic Drugs and Psychotropic Substances Act.<sup>40</sup> They argued, inter alia, that 'the respondent failed to understand correctly the law that regulated his decision-making power, by invoking a law which did not exist.' The respondent argued that the use of the Seizure Notice referring to the provisions of the repealed Dangerous Drugs (Forfeiture of Property) Act, was an oversight which is curable. They also argued that the same power under the repealed law was stated in the exact terms under section 31 of the Narcotics Drugs and Psychotropic Substances Act. The Supreme Court held that 'it is well settled that a wrong reference to the power under which actions are taken would not per se vitiate the action if it can be justified under some other power under which the actions could be lawfully undertaken.'<sup>41</sup> Thus, the principle applies even where an erroneous reference of law has been made.

## (ii) Irrationality

Irrationality questions the reasonableness of the decision or conduct of the administrator. Courts have consistently applied the *Wednesbury* unreasonableness test formulated in *Associated Provincial Picture House Ltd. v Wednesbury Corporation*.<sup>42</sup> The test is that the decision should be so outrageous in its defiance of logic or accepted moral standard that no sensible person who had applied his/her mind to the question to be decided could have arrived at it. On this ground, courts inevitably venture into the merits or substantive decision-making process. The relevant test is however not whether the decision is desirable or not. Rather the test is whether a rational decision maker placed in similar circumstances would have arrived at a different decision. The interesting variation of the ground as applied by Zambian courts is the assessment of the proportionality of the administrative action which was applied in *The Attorney General v Roy Clarke*.<sup>43</sup> In that case, the Attorney General (appellant) appealed against the decision of the High Court which nullified a deportation order against Roy Clarke (the respondent) on the ground that the deportation violated the Constitution and section 26(2) of the repealed Immigration and Deportation

<sup>38</sup> SCZ Judgment No. 24 Of 2003.

<sup>39</sup> Act 7 of 1989.

<sup>40</sup> Chapter 96.

<sup>41</sup> *Ibid.*

<sup>42</sup> [1947] 2 All ER 680.

<sup>43</sup> (2008) 1 Z.R. 38.

Act.<sup>44</sup> Section 26(2) of the now repealed Immigration and Deportation Act empowered the Minister of Home Affairs to deport from Zambia, any person ‘who in the opinion of the Minister [was] by his presence or his conduct likely to be a danger to peace and good order in Zambia.’ The respondent, a British national holding established residence status in Zambia, was deported after he published a satirical piece in the Post Newspaper in which he described the President and his ministers in what was described as ‘crude language.’<sup>45</sup> On an application for judicial review of the deportation order, the High Court nullified the deportation on the grounds that it violated the Constitution, section 26(2) of the Immigration and Deportation Act, was procedural improper and unreasonable. On appeal, the Supreme Court nullified the deportation order on the ground of irrationality but for reasons that are different from those stated in the High Court order. The Supreme Court held that the deportation of the respondent based on the facts was ‘disproportionate [and] too extreme an action.’<sup>46</sup>

### (iii) *Procedural impropriety*

This ground covers failure by an administrator to observe procedural rules that are expressly laid down by law and or under the common-law principles of natural justice. In reference to the application of the rules of natural justice, the Supreme Court in *The People v Roy Clarke*<sup>47</sup> held that where a statute does not oblige an administrator to give prior notice or a chance to be heard, the administrator was not obliged to hear the affected person or give them reasons for the decision. The court distinguished the case from its prior decision in *Zinka v The Attorney General*<sup>48</sup> where it had held that even in the absence of an express provision to exclude the *audi alteram partem* rule, there is a presumptive duty to give prior notice and an opportunity to be heard where ‘power is being exercised to impose penalties or to deprive a person of his livelihood; legal status (not being terminable at pleasure); personal liberty (not involving an illegal immigrant); property rights or any other legitimate interests or expectations.’ The Supreme Court in *Clarke* held the presumption could not apply because the respondent, not being a Zambian citizen, could not claim a right to stay in Zambia forever.

### (e) *Remedies for judicial review*

Courts have been reluctant to extend the remedies for judicial review beyond the ones provided under Order 53 of the Rules of the Supreme Court of England, which have their origins in the prerogative writs of certiorari, mandamus and prohibition. Applicants have however challenged the courts by seeking more creative remedies

<sup>44</sup> Chapter 123 has been repealed and replaced by the Immigration and Deportation Act 18 of 2010. The corresponding provision in the 2010 Act is s 35(2) which empowers the minister to declare persons inimical to the public interest as prohibited immigrants.

<sup>45</sup> *The Attorney General v Roy Clarke* (note 43).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> (1990–1992) Z.R. 73.

including damages for loss incurred because of maladministration, but have largely been unsuccessful.<sup>49</sup> Courts have also shown reluctance to order injunctive relief against the state citing provisions of section 16 of the State Proceedings Act,<sup>50</sup> which exempts the State from remedies such as injunctions or specific performance.<sup>51</sup> This is notwithstanding the fact that the State Proceedings Act applies to civil proceedings defined as ‘includes proceedings in the High Court or a subordinate court for the recovery of fines or penalties.’<sup>52</sup> One could argue that the definition does not include judicial review proceedings especially where the remedies sought do not include recovery of damages or similar remedy.

#### **(f) Constitutional role of Parliament and norm setting**

The constitutional role of Parliament as an oversight body over the exercise of public power is mainly in its law-making function as provided by article 62 of the Constitution. Another constitutional mandate of Parliament is to oversee the performance of executive functions by ensuring equity in the distribution of public resources and scrutiny of public expenditure among other functions stated in Article 63 of the Constitution. The National Assembly is obliged to facilitate public involvement in the legislation process.<sup>53</sup> In relation to the legislative function, the National Assembly has a role to play by enacting law that protects the Constitution and promotes democratic governance.<sup>54</sup> This duty would also entail enacting laws that properly prescribe lawful administrative authority and promote efficient public administration. The importance of good law cannot be over-emphasised considering the courts’ reluctance to expand the grounds of review beyond the common-law grounds.

## **4. ALTERNATIVES TO JUDICIAL REVIEW**

Judicial review plays an important role as a mechanism for holding government accountable. The very nature of adjudication, through which judicial review is accomplished, generally ensures certainty and predictability in the law, and, therefore, helps articulate and preserve cardinal constitutional values.<sup>55</sup> Without this certainty, constitutional values would give way to arbitrariness. Adjudication, however, has inherent weaknesses. Adjudication largely focuses on the narrow issues brought to the court. It does not consider broad social and policy problems that may underlie a problem. As a result, adjudication tends to be a piecemeal and

<sup>49</sup> For instance, the case of *The Attorney General v Roy Clarke* (note 43).

<sup>50</sup> Chapter 71.

<sup>51</sup> For instance, see the case of *Mifiboshe Walulya And Attorney- General and Hon. F. M. Chomba* (1980) Z.R. 327 (H.C.).

<sup>52</sup> State Proceedings Act, s 2.

<sup>53</sup> The Constitution of Zambia, art 89.

<sup>54</sup> *Ibid* art 61.

<sup>55</sup> David Dyzenhaus ‘Constituting the Rule of Law: Fundamental Values in Administrative Law’ (2002) 27 *Queen’s Law Journal* 446.

incremental mechanism of seeking redress.<sup>56</sup> Comprehensive change over a major issue would, therefore, be slow in coming.

In order to provide redress where judicial review may not be appropriate or ideal, Zambian administrative law provides for several other mechanisms intended to oversee the public administration machinery. These include appeals to ministers or other senior public officers, the Human Rights Commission, public inquiries, tribunals and the office of the Public Protector. All these are statute-based redress mechanisms. An overview of these is given below. However, more attention is given to the analysis of the role of the Public Protector as the institution, in its current form, is a new creation and promises to potentially play a major role in the administrative law landscape in future.

### **(a) *The Human Rights Commission***

The Human Rights Commission (HRC) was established in 1996 as an autonomous body.<sup>57</sup> It was created at a time when the country was still substantially reliant on donor aid. Many viewed its establishment with suspicion as it was seen as a move to placate or appease donors ahead of the 1997 international donor meeting to, *inter alia*, review Zambia's progress on human rights, which was a condition for renewing donor support.<sup>58</sup>

The HRC consists of the chairperson, vice-chairperson and not more than five other commissioners.<sup>59</sup> All the commissioners are appointed by the President, subject to ratification by the National Assembly. A President not committed to human rights can therefore simply avoid appointing commissioners and render the commission disabled. Indeed, the HRC had no commissioners from about February 2014 to July 2016, as the President did not appoint commissioners.<sup>60</sup> Commissioners are appointed for a tenure of three years and there is no inbuilt mechanism to ensure that at any time the HRC always has sufficient commissioners to meet the quorum.<sup>61</sup>

The functions of the HRC are generally very wide. They include investigating human rights violations and maladministration of justice; proposing measures to prevent abuse of human rights; inspection of conditions in prisons and other places of detention; research, education and information sharing; and rehabilitation of victims of human rights violations.<sup>62</sup>

<sup>56</sup> Jeff King 'Accountability: The Value of Courts in Light of the Alternatives' available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1027626](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027626), accessed 12 February 2019.

<sup>57</sup> Article 125 Constitution of the Republic of Zambia 1996. The existence of the HRC is currently provided for under Article 230 Constitution of Zambia (Amendment) Act 2 of 2016.

<sup>58</sup> Human Rights Watch, 'Protectors or Pretenders: Government National Human Rights Commissions in Africa' <http://www.hrw.org/legacy/reports/2001/africa/overview/record.html>, accessed 23 October 2015.

<sup>59</sup> Human Rights Commission Act 1996, s 5(1).

<sup>60</sup> Gilbert Sebihongo 'Zambia Human Rights Commissioners Sworn In' available at <https://www.nanhri.org/2016/07/22/zambia-human-rights-commissioners-sworn-in/>, accessed 31 January 2019.

<sup>61</sup> Human Rights Commission Act, s 7.

<sup>62</sup> *Ibid*, s 9. See also Article 230(2) Constitution of Zambia (Amendment) Act 2 of 2016.

Although the HRC's establishment was viewed with suspicion, its initial commissioners took their work seriously and operated courageously. They often condemned state torture, police abuse of human rights, exposed poor prison conditions and condemned government attacks on private media.<sup>63</sup> However, over the years, the HRC has become lukewarm and lost most of the steam of the initial commissioners. It is now an institution that largely takes comfort in innocuous human rights work such as conducting sensitisation meetings and issuing routine reports such as of prison visits which are not politically sensitive. Where it occasionally issues statements, they are often timid and cautious. It can be argued that it has become an institution more concerned about being politically correct than being an effective advocate of human rights. In the words of John Hatchard, the HRC can aptly be described as an institution that has 'found it extremely difficult to adopt a detached' response to the human rights discourse.<sup>64</sup>

An example of this approach is the HRC's 2012 submission to the Technical Committee Drafting the Zambian Constitution. The Commission vehemently opposed the inclusion of a provision protecting the rights of minorities by arguing that:

The provision itself is very open ended and may lead to the handing of certain rights to or inclusion of certain groups that the people of Zambia may not be ready or willing to accept. In particular, this concern is directed at members of the Lesbian, Gay, Bisexual, Transgendered and Inter-sex (LGBT) community.<sup>65</sup>

The HRC justified its position on the assertion that while human rights were universal, their enjoyment was subject, inter alia, to domestic culture and religion,<sup>66</sup> completely ignoring the universality of human rights which the institution was created to defend. If human rights were only enjoyed on such terms as the Commission purported, arguably that would be a major dent on the concept of human rights as religions and cultures are relative and cannot be made the condition precedent for enjoying human rights.

### **(b) Public inquiries**

Public inquiries provide a unique platform in public administration. Unlike courts or tribunals, public inquiries can judge public administration on a wide basis. An inquiry may look at a series of administrative actions, prospective plans or policies and may even ask questions about the appropriateness of certain policy choices.<sup>67</sup>

<sup>63</sup> Human Rights Watch, 'Protectors or Pretenders: Government National Human Rights Commissions in Africa' <http://www.hrw.org/legacy/reports/2001/africa/overview/record.html>, accessed 23 October 2015.

<sup>64</sup> John Hatchard, 'Legal Techniques and Agencies of Accountability: Human Rights Commissions in Commonwealth Africa,' in Muna Ndulo (ed) *Democratic Reform in Africa: Its Impact on Governance and Poverty Alleviation* (2006) 115.

<sup>65</sup> Human Rights Commission, *The First Draft Constitution: The Human Rights Commission's Submission to the Technical Committee on Drafting the Zambia Constitution* (July 2012).

<sup>66</sup> *Ibid.*

<sup>67</sup> Mark Elliot 'Ombudsmen, Tribunals, Inquiries: Re-Fashioning Accountability Beyond the Courts' *University of Cambridge Legal Research Paper Series* No. 21/2012.

Inquiries are usually initiated by the government and often intended to exhaustively deal with certain matters of public importance.<sup>68</sup> Inquiries further perform two other major roles. First, inquiries provide public administrators an opportunity to gather the fullest information and enable them to make better informed decisions. Second, they enable citizens to participate in decision making by providing interested individuals an opportunity to appear and provide their views, either in affirmation of or objection to a proposed course of action.<sup>69</sup>

In Zambia all the Commissions of Inquiry are appointed by the President in exercise of his power under the Inquiries Act.<sup>70</sup> The President has power under section 2 of the Act to appoint one or more commissioners to inquire into any matter in which an inquiry would, in the opinion of the President, be in the interest of the public. The commission is established at the discretion of the President.

Commissions of Inquiry have been used in a variety of subject matter in Zambia, including constitution making, determination of salaries for the civil service, investigation of suspicious deaths of political leaders, management of public universities, abuse of human rights, and road accidents. Commissions of inquiry have an inherent weakness in that they can only make recommendations. It is up to those in authority to decide whether or not they will implement those recommendations. The experience from the constitution making processes shows that the government often rejects most of the recommendations that are perceived as threatening the ruling party's hold on power, no matter how well intentioned the recommendations may be. Another weakness about Commissions is that by determining the terms of reference, the President can potentially determine the desirable outcome of an inquiry. For example, the terms of reference for the 1972 Constitutional Commission simply required the Commission to inquire into the mode of implementing a one-party state and not about the desirability or legitimacy of such a system of governance.<sup>71</sup>

### (c) *Tribunals*

Tribunals are administrative redress authorities that usually exist outside the ordinary court system.<sup>72</sup> Tribunals are usually creatures of statute. There is no universal model for tribunals. Instead, each tribunal is established to fit the task for which it is set up.<sup>73</sup>

<sup>68</sup> Ibid.

<sup>69</sup> BL Jones and K Thompson *Garner's Administrative Law* 8 ed (2005) 428.

<sup>70</sup> Chapter 41.

<sup>71</sup> See Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, October 1972.

<sup>72</sup> Abhishek Kumar Jhai 'Administrative Tribunals of India: A Study in the Light of Decided Cases' available at <http://ssrn.com/abstract> See also Lorne Sossin & Steven J Hoffman 'The Elusive Search for Accountability: Evaluating Adjudicative Tribunals' (2010) 28(2) *Windsor Yearbook of Access to Justice* 347.

<sup>73</sup> Jones & Thompson (*Supra* note 69) 377.

Tribunals are generally seen as providing ‘speedier, cheaper and more accessible justice than do ordinary courts.’<sup>74</sup> Since tribunals tend to focus on specific areas of public administration, such as tax administration, they are usually staffed by experts in those areas and, therefore, can deal with matters more expertly and rapidly than courts which may need expert testimony to help them arrive at an informed decision.<sup>75</sup>

In Zambia, tribunals are strewn across several statutes dealing with specialised subject matter. Each tribunal is, therefore, established by a specific statute to serve a clearly defined purpose. Although there are several tribunals, the most well-known are the Lands Tribunal, the Liquor Licensing Tribunal, the Urban and Regional Planning Tribunal, the Tax Appeals Tribunal, and the Competition and Consumer Protection Tribunal.

The Lands Tribunal was initially established under section 20 of the Lands Act 1995. It is now provided for under section 3 of the Lands Tribunal Act 2010. The jurisdiction of the Lands Tribunal is stated under section 4(1) of the Act, and basically relates to resolution of land disputes. Section 4(2)(h) and (i) of the Lands Tribunal Act empowers the Tribunal to make any declaration it considers appropriate and to grant injunctive relief or any interlocutory relief it considers appropriate. This is important as it reverses the jurisprudence established in the case of *Kawana Mwangelwa v Ronald Bwale Nsokoshi and Ndola City Council*.<sup>76</sup> This case had held that the jurisdiction of the Lands Tribunal is limited to the settlement of ‘land disputes’ under the Act, and is not an alternative forum to the High Court to which parties can go to even for the issuance of prerogative writs such as mandamus. This, however, now presents potential conflict in the mandate of the Tribunal and the jurisdiction of the High Court. The provision, therefore, entails that in land matters the Tribunal can provide any remedy that the High Court may give, including prerogative writs.

The Liquor Licensing Act<sup>77</sup> empowers the minister to appoint an Appeal Tribunal to deal with appeals against decisions of the Liquor Licensing Committee.<sup>78</sup> The Tribunal has power to order any person to attend as a witness and give evidence, take evidence on oath or conduct investigation it considers necessary, and award costs.<sup>79</sup> In determining an appeal, the Tribunal is entitled to make such orders as it thinks fit, and such orders are binding.<sup>80</sup>

The Tax Appeals Tribunal was initially established under the Revenue Appeals Tribunal Act 1998 and was known as the Revenue Appeals Tribunal. The Revenue Appeals Tribunal Act 1998 was repealed and replaced by the Tax Appeals Tribunal

<sup>74</sup> HWR Wade & CF Forsyth *Administrative Law* 11 ed (2014) 763.

<sup>75</sup> *Ibid*, 766.

<sup>76</sup> SCZ No. 29 of 2000.

<sup>77</sup> 20 of 2011.

<sup>78</sup> Liquor Licensing Act 20 of 2011, s 23(1).

<sup>79</sup> *Ibid*, s 24(a).

<sup>80</sup> *Ibid*, s 24(10).

Act of 2015.<sup>81</sup> Section 3 of the Tax Appeals Tribunal Act provides for the continued existence of the Revenue Appeals Tribunal but renamed it to 'Tax Appeals Tribunal'. Section 5 of the Act mandates the Tribunal with jurisdiction to hear and determine taxation disputes.

The Urban and Regional Planning Act 2015 empowers the minister, by statutory instrument, to constitute a Planning Appeals Tribunal for each province in the country.<sup>82</sup> There is, therefore, not a single Planning Appeals Tribunal for the whole country. Instead, each province has its own Planning Appeals Tribunal. The Tribunal hears and determines appeals from the decisions of provincial planning authorities.

The Competition and Consumer Protection Tribunal is established under section 67(1) of the Competition and Consumer Protection Act.<sup>83</sup> The Tribunal has jurisdiction to hear appeals against decisions of the Competition and Consumer Protection Commission. An appellant is required to appeal to the Tribunal within 30 days of receiving the decision of the Commission appealed against.<sup>84</sup> The Tribunal has power to summon witness, call for the production of, or inspection of books, documents, and other things, and to examine witnesses on oath.<sup>85</sup> Where a merger was effected in violation of the Competition and Consumer Protection Act 2010, the Tribunal has power to order a party to the merger to sell any shares, interests or other assets acquired as a result of the merger; or to declare as void any provision of an agreement to which the merger was subject.<sup>86</sup> The Tribunal can further direct any firm, or any other person, to sell any shares, interests or assets of the firm if the prohibited practice it is considering cannot be adequately remedied in terms of another provision in the Act; or is substantially conduct by that firm previously that has been found by the Tribunal to have been a prohibited practice.<sup>87</sup>

Generally, tribunals do not enjoy much independence from the executive as the members of the tribunal are appointed by the concerned minister (usually over whose ministry the tribunal exercises oversight) who sets their conditions of service.

#### **(d) *The Public Protector***

The proposal about the need for an Ombudsman institution in Zambia was first made by President Kenneth Kaunda in 1971 to address perceptions of increased corruption and abuse of power by government leaders.<sup>88</sup> The suggestion was taken up by the 1972 Constitutional Review Commission. The Commission received submissions to the effect that several leaders had accumulated property as a result of

---

<sup>81</sup> 1 of 2015.

<sup>82</sup> Urban and Regional Planning Act 2015, s 62(1).

<sup>83</sup> 24 of 2010.

<sup>84</sup> *Ibid*, ss 60 and 68.

<sup>85</sup> *Ibid*, s 71(2).

<sup>86</sup> *Ibid*, s 73(1).

<sup>87</sup> *Ibid*, s 73(2).

<sup>88</sup> Commission for Investigations Annual Report (2005) 7.



corruption and abuse of authority.<sup>89</sup> The Commission, therefore, recommended the establishment of the institution of an Ombudsman, to be known as the Investigator-General. The Commission summarized the benefits of this office to public administration as follows:

The Ombudsman would be of tremendous value to the administration—

- (a) by informally advising, reminding and reproving;
- (b) by soothing public feeling over reports of outrageous practices by the very fact that their complaints were receiving his attention; and
- (c) by rejecting unjustified complaints.<sup>90</sup>

This shows that in the original design, the office of the Investigator-General was not intended to have binding power but simply to have soft power to receive complaints, investigate and make recommendations.

The recommendations of the Commission were included in Article 90 of the 1973 Constitution which established the office of the Investigator-General. The office became functional in 1974 with the passage of the now repealed Commission for Investigations Act.<sup>91</sup> Under this law, the role of the Ombudsman was performed by the Commission for Investigations, which was chaired by the Investigator-General (IG). The IG was appointed by the President, in consultation with the Judicial Service Commission.<sup>92</sup> The IG was to be someone qualified to be appointed as a High Court judge.<sup>93</sup> The IG enjoyed security of tenure and would retire at the age of 65 years.<sup>94</sup> He or she could only be removed from office for incompetence, inability to perform functions of the office or for misbehaviour. The decision to remove the IG could only be made by the President on the recommendation of a judicial tribunal and supported by a two-thirds resolution of the National Assembly (NA).<sup>95</sup>

The IG served with three other commissioners who were directly appointed by the President.<sup>96</sup> The three commissioners enjoyed no security of tenure. Their term of office was three years, renewable once, and were removable from office by the President, without any resort to an independent tribunal or the NA.<sup>97</sup>

The Commission had competence to investigate the following:

- (a) Any person in the service of the Republic;
- (b) The members and persons in the service of local authorities;
- (c) The members and persons in the service of any institution or organisation, in which the government held a majority of shares or exercised financial control;

<sup>89</sup> Report of the National Commission on the Establishment of A One-Party Participatory Democracy in Zambia, (October 1972) para 128.

<sup>90</sup> *Ibid.*

<sup>91</sup> Chapter 39.

<sup>92</sup> Constitution of Zambia 1996, Art 90(1).

<sup>93</sup> *Ibid.*, Article 90(2)(a).

<sup>94</sup> *Ibid.*, Article 90(3).

<sup>95</sup> *Ibid.*, Article 90(5) and (6).

<sup>96</sup> Commission for Investigations Act, s 4(1).

<sup>97</sup> *Ibid.*, s 5(2).

(d) The members and persons in the service of any commission established by or under the Constitution or any Act of Parliament.<sup>98</sup>

The Commission, however, was barred from investigating the President, decisions of a court or a judicial officer or of any tribunal established by law, or any matter relating to the exercise of the prerogative of mercy.<sup>99</sup> It had jurisdiction to inquire into the conduct of any person whenever directed to do so by the President and in any case it considered that an allegation of maladministration or abuse of office or authority ought to be investigated.<sup>100</sup>

The Commission only had an office in the capital city (Lusaka) and only made occasional visits to other provinces. The consequence was that it was an institution not easily accessible to many citizens.

The Commission was empowered to receive complaints or allegations from any individual or any body of persons, whether corporate or not.<sup>101</sup> Both oral and written complaints were admissible. The Commission, however, could not ordinarily receive any complaint or allegation made more than two years after the person making the complaint came to know of the facts giving rise to the complaint or allegation.<sup>102</sup>

Every investigation by the Commission was carried out in camera or in secret.<sup>103</sup> The process, therefore, closed off public participation. The Commission could refuse or discontinue an investigation where it was satisfied that: '(a) The complaint was trivial, frivolous or not made in good faith; or (b) the inquiry would be unnecessary, improper or fruitless'<sup>104</sup>

Where the Commission decided not to conduct or to discontinue an investigation, it was required to inform the complainant in writing but it was not required to give reasons for its decision.<sup>105</sup> The Commission was required to submit a report to the President of every investigation it had conducted, containing:

- (a) A summary of the evidence taken together with the conclusion and recommendations of the Commission;
- (b) A statement of any action that has been taken by any person whose conduct is under investigation or by the department or authority of which such a person is a member or in which he is employed, to correct or ameliorate any conduct, procedure, act or omission that is adversely commented on in the report;
- (c) Where any person has suffered loss or injury as a result of an alleged misconduct, maladministration or abuse of office or authority by any person whose conduct is under investigation, and the Commission has found allegations to be true, the Commission may in its recommendations state that compensation should be paid to

<sup>98</sup> *Ibid*, s 3(1).

<sup>99</sup> *Ibid*, s 3(2).

<sup>100</sup> *Ibid*, s 8.

<sup>101</sup> *Ibid*, s 9(1).

<sup>102</sup> *Ibid*, s 9(4).

<sup>103</sup> *Ibid*, s 16.

<sup>104</sup> *Ibid*, s 10(2).

<sup>105</sup> *Ibid*, s 10(3).

the person who has suffered such loss or injury or to any dependent of such person, and shall determine the sum which it recommends as compensation.<sup>106</sup>

It was entirely up to the President to take any decision or action on the report as s/he thought fit.<sup>107</sup> The Commission was also required to submit a report on its operations annually to the National Assembly. The report to the NA by law could not disclose the identity or contain any statement which could point to the identity of any person into whose conduct an investigation had been or was about to be made.<sup>108</sup> Without these details, it meant that the Commission's report to the NA was of little use as it became difficult for the legislators to debate the matters it raised from an informed perspective or even follow up on some cases. As a result, the Commission played no major role in the good governance discourse of the country and has had very little impact on governance.

During its existence, the Commission had several challenges, bearing on its independence and capacity to deliver on its mandate. For example, although the Commission was established as an autonomous institution, its staff were civil servants. The anomalous nature of this situation was aptly captured in the Commission's 2005 report:

Although the Act allows the Commission to employ its own staff, this has not been practically possible as all positions within the Commission's establishment are civil service positions, with the exception of the office of the Investigator- General and the Commissioners. Therefore, any changes in the establishment of the institution are subject to approval by Cabinet Office as are the commensurate conditions of service. Currently, all of the Commission's staff are drawn from the Civil Service, i.e. they come on direct transfer from other government departments. This is not a very desirable state of affairs as it may create some conflict of interest in some instances as the members of staff are drawn from departments and ministries which are subject to the jurisdiction of the Commission.<sup>109</sup>

For many years the Commission seemed to be poorly run, underfunded and disorganised. An internal audit of its operations in 2005, for example, found that the Commission could not trace 1, 264 files of complaints made to it.<sup>110</sup> Its reports have usually been produced erratically and are often delayed, sometimes going for several years without publishing a report. For example, the most recent publicly available report of the Commission was issued in 2012.<sup>111</sup>

Because of such shortcomings, it is hardly surprising that the office of the Investigator- General became a target of reform in subsequent constitution making processes, starting from 1995. The 1995 Constitutional Review Commission received several submissions from the public who strongly felt that the Office of the Investigator-General had failed to perform its expected function of holding

<sup>106</sup> Ibid, s 20.

<sup>107</sup> Ibid, s 21(1).

<sup>108</sup> Ibid, s 22(1) and (2).

<sup>109</sup> Commission for Investigations Annual Report (2005) 11.

<sup>110</sup> Ibid, 14.

<sup>111</sup> Commission for Investigations Annual Report 2012.

government accountable on behalf of the citizens.<sup>112</sup> The people also found it anomalous that the Investigator-General reported to the Executive, the same institution it was supposed to hold accountable. To redress this, the Constitutional Review Commission recommended a change of name from Investigator-General to the name Parliamentary Ombudsman.<sup>113</sup> The Commission reasoned that the change of name would have a psychological reorientation effect both to the citizens and government towards the role of the institution. It was further recommended that the Parliamentary Ombudsman should be independent of the Executive and report directly to the National Assembly. A clause to this effect was included in the draft constitution and gave the Parliamentary Ombudsman power to ‘investigate and redress’ complaints of maladministration and abuse of power by officials.<sup>114</sup> The 2005 Constitutional Review Commission had actually gone further to propose enhancing the powers of the Parliamentary Ombudsman by allowing the Parliamentary Ombudsman to ‘investigate and prosecute’ cases of abuse of office and maladministration.<sup>115</sup> These proposals have been part of all subsequent draft constitutions leading to the 2016 constitutional amendment.

However, when the Constitution was substantially amended in 2016,<sup>116</sup> the office became known as Public Protector (PP) and not Parliamentary Ombudsman as earlier suggested, a direct transplantation of the nomenclature from the South African Constitution. Article 243(1) of the Constitution of Zambia establishes the PP, who is appointed by the President on recommendation by the Judicial Service Commission, subject to ratification by the National Assembly. A person qualifies to be appointed as the PP ‘if (a) that person is qualified to be appointed as a judge; and (b) does not hold a State office or Constitutional office.’<sup>117</sup>

Article 247 (1) of the Constitution gives the PP relatively secure tenure by providing that he/she shall retire from office on attaining the age of sixty years. It further states that ‘The Public Protector may be removed from office on the same grounds and (using the same) procedure as [those which] apply to a judge.’<sup>118</sup>

Although the Public Protector is established as a single-person entity and is guaranteed autonomy, the implementing legislation seems to have made major attempts to dilute this. Section 7(1) of the Public Protector Act 2016, for example, creates the office of two Deputy Public Protectors, appointed by the Public Protector on the recommendation of the Parliamentary Service. This seems contrary to the Constitution which does not contemplate these positions. In fact, article 246 of the Constitution categorically states that when the PP is unavailable to perform his/her functions, the President shall appoint another person to perform that role. The consequence of this could be to dilute the autonomy of the office. This is more so,

<sup>112</sup>Report of the Constitutional Review Commission, June 1995, para 24.0.

<sup>113</sup>Ibid.

<sup>114</sup>Draft Constitution of the Republic of Zambia 1995, Clause 164(1).

<sup>115</sup>Report of the Constitutional Review Commission (December 2005).

<sup>116</sup>Constitution of Zambia (Amendment) Act of 2016.

<sup>117</sup>Ibid Article 243(2).

<sup>118</sup>Ibid Article 247 (3).

considering that in terms of section 21(3) of the Act, determination matters before the PP should be according to the opinion of the majority members. The effect of this is that the PP can be outvoted by the two deputies, who ironically do not have any constitutional mandate.

The Public Protector has the power to investigate an action or decision taken or omitted to be taken by a State institution in the performance of an administrative function.<sup>119</sup> Article 266 defines a State institution as ‘includ[ing] a ministry or department of the Government, a public office, agency, institution, statutory body, commission or company in which the Government or local authority has a controlling interest, other than a *State organ*.’ (emphasis added) Under the same article, a state organ is defined as ‘the Executive, Legislature or Judiciary.’ These provisions create unnecessary ambiguity. State organs do not exist in abstract but are staffed by human beings and, therefore, it seems counterproductive to immunise public officers inhabiting those institutions. The rationale for this approach is unclear and in any case flies in the face of the drafting history of the provision as it was primarily to have officials in such key institutions amenable to the oversight role of the Ombudsman in order to redress corruption and abuse of authority.

Article 244(2) defines an action or decision taken or omitted to be taken as an action or decision which is ‘(a) unfair, unreasonable or illegal; or (b) not compliant with the rules of natural justice’.

What constitutes rules of natural justice is not defined in the Constitution, but is defined under section 2 of the Public Protector Act as:

The principles and procedures underlying the making of a decision or taking of an action by a State institution, which are that an act or decision should be unbiased, transparent and made in good faith; and that each party should have equal access to the person taking the action or making the decision and should be aware of the facts of the decision and the documents that are used or adduced by the person taking the action or making the decision.

In furtherance of these functions, the PP has power under Article 244(3) of the Constitution to:

- (a) bring an action before a court;
- (b) hear an appeal by a person relating to an action or decision taken or omitted to be taken in respect of that person; and
- (c) make a decision on an action to be taken against a public officer or Constitutional office holder, which decision *shall* be implemented by an appropriate authority. (emphasis by authors)

Article 244(3)(c) suggests that the decision or action taken against a public officer or constitutional office holder is binding and not a mere recommendation. This seems to be in line with South African jurisprudence from which the current PP model was borrowed. In the South African case of *Economic Freedom Fighters v Speaker of the National Assembly and Other*,<sup>120</sup> South African Chief Justice, Mogoeng Mogoeng, in relation to the powers of the Public Protector, stated:

<sup>119</sup> Ibid Article 244(1).

<sup>120</sup> [2016] ZACC 11.

If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of our constitutional democracy. The purpose of the office of the Public Protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in State affairs, all spheres of government and State-controlled institutions. The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant.

The Public Protector Act, however, seems to deviate from this position in as much as it does not expressly provide that remedial actions by the Public Protector are binding. Section 6(2)(a), for example, in vesting the Public Protector with power to consider administrative actions, only empowers the PP to make ‘recommendations’ to state institutions, contrary to the extensive powers given to the PP by article 244(5) of the Constitution which include ‘(d) enforcing decisions issued by the Public Protector; and (e) citing a person or an authority for contempt for failure to carry out a decision.’

While the Constitution has given the Public Protector extensive powers, these powers are limited by provisions of 245 of the Constitution which divests him/her power to investigate a matter which:

- (a) is before a court, court martial or a quasi-judicial body;
- (b) relates to an officer in the Parliamentary Service or Judicial Service;
- (c) involves the relations or dealings between the Government and (a) foreign government or an international organization;
- (d) relates to the exercise of the prerogative of mercy; or
- (e) is criminal in nature.

While limitations (a) to (c) could be understandable as there might be better mechanisms for redressing complaints relating to those, the restrictions under (d) and (e) are clearly unmeritorious. The exercise of the prerogative of mercy, for example, has been used in the Zambian context to free politicians convicted of corruption related offences in order to advance political interests of incumbent presidents.<sup>121</sup> That abuse should surely be subject to the scrutiny of the Public Protector. Further, the limitation of jurisdiction over complaints of a criminal in nature entails that the PP may not, for example, investigate complaints of corruption, which is clearly criminal and often the cause of maladministration.

<sup>121</sup> ‘President Edgar Lungu Pardons Jailed MMD MP Moses Muteteka’ available at <https://www.lusakatimes.com/2015/06/04/president-edgar-lungu-pardons-jailed-mmd-mp-moses-muteteka/> accessed 12 February 2019; ‘Pardoned Mbombo Praises his Saviour Lungu’ available at <https://www.zambiawatchdog.com/mpombo-praises-lungu-the-man-who-saved-him-from-prison/> accessed 12 February 2019; ‘Prison Life is Tough, Says Masumba’ available at <http://www.daily-mail.co.zm/prison-life-tough-says-masumba/> accessed 12 February 2019; and ‘Convicted former Labour Minister Austin Liato Released from Prison’ available at <https://www.lusakatimes.com/2015/08/24/convicted-former-labour-minister-austin-liato-released-from-prison/> accessed 12 February 2019.

Initiation of investigations is governed by section 13(1) of the Public Protector Act which states that the PP may investigate an allegation of maladministration:

- (a) on the Public Protector's own initiative; or
- (b) on receipt of a complaint made by
  - (i) a complainant acting in the complainant's own interest;
  - (ii) an association acting in the interest of its members;
  - (iii) a person acting on behalf of a complainant;
  - (iv) a person acting on behalf, and in the interest, of a group or class of persons; or
  - (v) an anonymous person.

The Public Protector may refuse to investigate or discontinue an investigation on grounds that the complaint is trivial, frivolous, vexatious or not made in good faith; where the complainant does not have sufficient interest in a matter; where the complainant has a right of appeal or other remedy that has not been exhausted; or the conduct complained of has been subject of another investigation or another action by another authority under a written law.<sup>122</sup>

When it comes to reporting, Article 248 of the Constitution states that the PP shall report to the NA on matters concerning its affairs. Further, section 34(1) of the PP Act requires the PP to submit a report to the Speaker of the NA, not later than 90 days after the end of the financial year. Section 34(2) enjoins the Clerk of the National Assembly to lay the report before the NA, not later than seven days after the first sitting of the Assembly next after the report was received. This is an improvement over the former legislation that required the PP to simply report to the President.

It should be noted that although the law has been altered to establish the office of the PP, the government has not funded the institution and at the time of writing, only the name had really changed. The staff establishment and new institutional structures have yet to be implemented. Despite this, a few potential positive and negative lessons can be anticipated. Notably, the new requirement for the PP to report to the National Assembly and not the President could enhance transparency and accountability as the reports of the PP will be debated in the open and made more accessible to the public. The changes to the law have also made the tenure of the PP relatively more secure as he or she will only be removable in the same manner as judges of superior courts. By being given power to make binding decisions, the PP has more latitude to ensure better public administration. The Public Protector, unlike under the former law where proceedings were in private, has now been empowered to hold public hearings. This potentially enhances transparency and accountability.

That said, the PP model may face several challenges on its way to being an effective defender of public interests. For example, as noted above, section 15 of the PP Act has increased grounds on which the PP can refuse to investigate a complaint of maladministration. As noted, some of these restrictions are completely unjustified.

<sup>122</sup>Section 15(1) of the Public Protector Act 2016.

Further, section 11 of the Act requires the PP to take an oath of office provided for in the Official Oaths Act.<sup>123</sup> This oath requires the PP to bear allegiance to the President, and therefore, waters down the autonomy of the PP. The role of the PP should be to enforce constitutional administrative standards and not to be loyal to the President.

Finally, as already noted above, section 21(3) of the PP Act states that the determination of a matter under the PP is by a majority. This dilutes the autonomy of the PP and potentially means the PP could be outvoted by subordinate officers who do not have any constitutional mandate to exercise the role of the PP. The PP, as the bearer of the constitutional mandate, should have the final say.

## 5. CONCLUSION

The right to fair administration is not guaranteed in the Zambian Constitution, although previous constitutional review efforts reveal a consistent desire to include this right in the Bill of Rights. Notwithstanding the absence of a constitutional right to administrative justice, the Constitution of Zambia contains provisions that justify the court's jurisdiction to conduct judicial review of certain administrative conduct. The law applicable is the common law and the English procedural law provided under Order 53 of the Rules of the Supreme Court of England 1999. Courts have not radically developed the common-law grounds for review nor have they been creative with the remedies. There are alternatives to judicial review namely, public inquiries, tribunals and the Public Protector. The Public Protector is a relatively new office introduced as part of the 2016 amendment to the Constitution. It replaces the former office of the Investigator General and has more powers than its predecessor.

---

<sup>123</sup>Chapter 5 of the Laws of Zambia Act.



# The Control of Administrative Power in Zimbabwe and Implications of Substantive Fairness as a Ground of Review

JUSTICE ALFRED MAVEDZENGE\*

## ABSTRACT

Prior to the adoption of the Constitution of Zimbabwe in May 2013, the right to administrative justice was not guaranteed as a constitutional right but only as a statutory right. The 'new' Constitution recognises administrative justice as a constitutional right and designates lawfulness, reasonableness and procedural fairness as grounds for review. These were already recognised in the statute, as grounds for review of administrative conduct. However, the Constitution has now added 'substantive fairness' as another ground for review. This has triggered the question whether the addition of substantive fairness to the list of grounds for review introduces anything new to the rubric of administrative law review in Zimbabwe. In this chapter, I grapple with this question by analysing what substantive fairness entails as a

ground for review, its potential ramifications on the doctrine of separation of powers, and how these ramifications can be addressed. I conclude by suggesting rationality and proportionality as the appropriate standard of review in order to establish the substantive fairness of administrative conduct. Thus, I come to the conclusion that a review on the ground of substantive fairness is akin to a review on the ground of reasonableness and therefore, it does not add anything substantively new to the rubric of administrative law review in Zimbabwe. However, by expressly mentioning substantive fairness as a ground for review, the Constitution puts beyond question that courts in Zimbabwe have the jurisdiction to review not only the procedural fairness of administrative conduct but also its fairness in substantive terms.

## 1. INTRODUCTION

The adoption of a new Constitution in 2013 introduced fundamental changes to the administrative law review system in Zimbabwe. Prior to the 2013 Constitution, the right to administrative justice existed as a statutory right provided for in the Administrative Justice Act (AJA),<sup>1</sup> but not as a constitutional right. The 2013 Constitution now recognises the right to administrative justice as part of the Bill of Rights. In addition to elevating administrative justice to the status of a constitutional right, the Constitution also introduces a new formulation of grounds of review. It recognises 'substantive fairness' as amongst the grounds of review. This

---

\*Justice Alfred Mavedzenge has a PhD in Public Law from the University of Cape Town. He is a Researcher at the Democratic Governance and Rights Unit and is a part-time constitutional law lecturer at the University of Cape Town.

<sup>1</sup> Chap 10:28 of 2004.

has generated a debate on whether this is a substantively new ground of review or it is just a new formulation which means nothing more than an emphasis of a review of the reasonableness and or proportionality of administrative conduct. My main objective in this chapter is to grapple with this question. However, in order to provide the necessary context, I begin by providing an overview of the available avenues for the control of administrative power in Zimbabwe.

## 2. OVERVIEW OF THE MECHANISMS FOR THE CONTROL OF ADMINISTRATIVE AUTHORITY IN ZIMBABWE

The Zimbabwean administrative law system provides for the control of administrative authority through both non-judicial and judicial means. In the paragraphs below, I highlight the non-judicial means of controlling administrative power.

### *(a) Non-judicial avenues for controlling administrative authority*

Other than through judicial review, there are 'non-judicial means' through which individuals and groups can seek access to administrative justice. These non-judicial avenues include the control of administrative power through appeals bodies. Appeals bodies or tribunals are provided for both in the Constitution<sup>2</sup> and in legislation.<sup>3</sup> Persons who are aggrieved by certain decisions (including administrative conduct) can appeal to these bodies for appropriate redress, which includes setting aside the impugned decision and substituting the decision with another. Non-judicial mechanisms also include the control of administrative authority through parliamentary oversight. The Constitution gives Parliament the authority to demand accountability from public officials (including Ministers) for the exercise of public power and functions assigned to them by the law.<sup>4</sup> Thus, persons who are aggrieved by administrative decisions can report to Parliament and request the legislature to demand accountability on their behalf.

As part of the non-judicial control mechanisms, Zimbabwe does not have an appeals body with general power to control all kinds of administrative authority, as is the case in other jurisdictions.<sup>5</sup> However, the Constitution of Zimbabwe provides for the establishment of specialised 'ombudsperson type' institutions such as the Auditor General, with limited jurisdiction to review specific kinds of admin-

<sup>2</sup>These include independent constitutional commissions (such as the Zimbabwe Human Rights Commission, the Zimbabwe Gender Commission, the Zimbabwe Media Commission) especially when they review administrative decisions which impact on human rights.

<sup>3</sup>For example, the Environmental Management Agency established in terms of s 9 of the Environmental Management Act, Chap 20:27 of 2002; the Health Service Board established in terms of s 3 of the Health Services Act, Chap 15:16 of 2004; the water catchment councils established in terms of s 20 and s 21 of the Water Act, Chap 20:24 of 1998.

<sup>4</sup>See s 119 (2) and (3) of the Constitution of Zimbabwe, 2013. This power is also exercised through parliamentary portfolio committees which can summon public officials to appear and account on the exercise of public power and performance of their functions.

<sup>5</sup>For example, the Constitution of South Africa provides for the establishment of the Office of the Public Protector. See ss 181(1)(a) and 182 (1) of the Constitution of the Republic of South Africa, 1996.

istrative authority. For example, the Auditor-General checks against maladministration in the way public resources are utilised. Another example is the envisaged establishment of an 'Independent Complaints Mechanism',<sup>6</sup> which is a body that is meant to review complaints submitted by the public in respect of misconduct by members of the security services. The non-judicial mechanisms also include the guarantee of the constitutional right of access to information in section 62 of the Constitution. This right can be exercised to access information held by the state where the information is necessary for the enforcement of public accountability or where the information is necessary for the protection of a fundamental right.<sup>7</sup> Thus, individuals (who are Zimbabwean citizens and or those with permanent residence status in Zimbabwe) can invoke this right in order to obtain information necessary for them to review the appropriateness of administrative decisions, and demand accountability from administrative officials.

Although the provision of these non-judicial avenues for the control of administrative powers should be seen as a progressive development in the Zimbabwean legal system, their effectiveness has remained illusory to date. The reasons or factors constraining the effectiveness of these mechanisms have already been discussed in detail by Professor Geoff Feltoe.<sup>8</sup> Therefore, there is no need to regurgitate them here save to summarise them as follows: some of the tribunals are yet to be established;<sup>9</sup> in some cases the enabling legislation (which is supposed to regulate the operations of these tribunals) has not yet been realigned with the Constitution;<sup>10</sup> and these tribunals are under-resourced and they generally lack the independence to discharge their functions properly. For these reasons, there is a heavy reliance on judicial review as an avenue for the control of administrative authority in Zimbabwe. This is notwithstanding the challenges confronting the mechanisms for judicial review.<sup>11</sup>

### **(b) Judicial review**

Judicial review has been given impetus following the introduction of a fully justiciable constitutional right to administrative justice. Prior to the adoption of the 2013 Constitution, the right to administrative justice was provided for and governed by the Administrative Justice Act [Chapter 10:28] of 2004 [AJA]. It was therefore a statutory rather than a constitutional right. The right to administrative justice is now enshrined in section 68 of the Constitution as follows:

<sup>6</sup> *Supra* note 4 at s 210.

<sup>7</sup> *Ibid* s 62 (1) and (2).

<sup>8</sup> Geoffrey Feltoe *A Guide To Administrative And Local Government Law In Zimbabwe* (2012) at 12–13 and 116.

<sup>9</sup> For example, the Independent Complaints Mechanism envisaged in the Zimbabwe Constitution *supra* note 4 at s 210.

<sup>10</sup> For example, the following legislation has not yet been realigned with the Constitution: The Administrative Justice Act, Chap 10:28 of 2004 and the Access to Information and Protection of Privacy Act, Act 20 of 2007.

<sup>11</sup> These challenges include constrained judicial independence and limited access to courts due to high costs of litigation.

- (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
- (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

Thus, similar to other comparative jurisdictions,<sup>12</sup> legality, reasonableness and proportionality are recognised as grounds of review of administrative conduct in Zimbabwe. These existed as grounds of review,<sup>13</sup> prior to the adoption of the 2013 Constitution and they have been thoroughly examined by Feltoe.<sup>14</sup> However, the 2013 Constitution has also introduced 'substantive fairness' as an additional ground of review. There is next to nothing in the Zimbabwean administrative law jurisprudence which explains what a review on the grounds of substantive fairness entails. Zimbabwean courts have the option to refer to foreign law from comparative jurisdictions, when interpreting the meaning of constitutional rights.<sup>15</sup> However, substantive fairness is not expressly provided for in most comparative jurisdictions,<sup>16</sup> and this could make it difficult for Zimbabwean courts to draw inspiration from foreign courts when interpreting and applying this ground of review. In view of this, there is an apparent practical need to examine what substantive fairness as a ground of review entails and evaluate if it introduces anything new that is not already covered under the grounds of review which existed prior to the 2013 Constitution.

### 3. THE IMPLICATIONS OF SUBSTANTIVE FAIRNESS AS A GROUND OF REVIEW

In the updated version of his seminal book on administrative law in Zimbabwe, Feltoe<sup>17</sup> argues (albeit without providing more detail) that:

Previously, administrative authorities were only required to carry out their duties in accordance with principles of procedural fairness that is in accordance with principles of natural justice. Section 68 [of the Constitution of Zimbabwe] adds a new requirement that in addition to administrative action being procedurally fair it must also be substantively fair.

I agree with Feltoe on the point that a review on the grounds of substantive fairness is an inquiry into whether the decision imposes undue or unfair disadvantages on the applicant. However, I respectfully disagree with him on the point that this is a new requirement. The crux of my argument is that although it is true that prior to the 2013 Constitution, 'substantive fairness' was not expressly mentioned

<sup>12</sup> Which include Kenya and South Africa, from whom the drafters of the 2013 Zimbabwean Constitution borrowed.

<sup>13</sup> See s 3(1) of the Administrative Justice Act, Chap 10:28 of 2004.

<sup>14</sup> Feltoe op cit 8 at 93–116.

<sup>15</sup> See *supra* note 4 s 46(1)(e).

<sup>16</sup> For example, it is not expressly provided for in the comparative constitutions which include the Constitutions of South Africa, Kenya, Namibia, Malawi and it is equally absent in the legal frameworks of the United Kingdom and Canada.

<sup>17</sup> See 'A Guide To Administrative And Local Government Law In Zimbabwe' 2012, available at <https://zimlil.org/content/new-constitutional-guarantee-administrative-justice>, accessed on 8 March 2019.

as a ground of review, a review of the substantive fairness of conduct essentially involves examining whether the decision-maker acted irrationally or in a disproportionate manner, and consequently came to a decision which imposes unfair disadvantage on the applicant. These are the same considerations that are made when a review is conducted on the grounds of reasonableness and I therefore argue that, conceptually, this ground of review does not introduce anything substantively new to administrative law review in Zimbabwe.

Before I explain these arguments, it is necessary to clarify as a point of departure that section 68 (1) of the Constitution clearly shows that a review on the grounds of substantive fairness is not the same as a review on the grounds of procedural fairness. Section 68 (1) says every person has a right to administrative action that is ‘both procedurally and substantively fair’. This implies that the two (procedural and substantive fairness) are separate grounds of review.

The recognition of procedural fairness as a ground of review under the Zimbabwean administrative law predates the 2013 Constitution, as mentioned above.<sup>18</sup> At the core of procedural fairness is the *audi alteram partem* rule which, as Feltoe puts it, ‘requires that a decision affecting a person’s rights or his or her legitimate expectations of receiving a benefit, advantage or privilege should only be made after hearing first from that person and taking into account what he or she has said.’<sup>19</sup> This was recently underscored by the Zimbabwean High Court in *Augar Investments OU v Minister of Environment*.<sup>20</sup> Procedural fairness is encapsulated as follows in section 3 (2) of AJA:

In order for an administrative action to be taken in a [procedurally] fair manner as required by paragraph (a) of subs (1), an administrative authority shall give a person referred to in subs (1)—(a) adequate notice of the nature and purpose of the proposed action; and (b) a reasonable opportunity to make adequate representations; and (c) adequate notice of any right of review or appeal where applicable.

A review of procedural fairness therefore focuses primarily on the decision-making process, while a review of substantive fairness focuses on the decision itself. The latter is a review of the substantive content of the decision and its impact on the parties involved.<sup>21</sup> Such an interpretation of substantive fairness as a ground of review immediately attracts at least two criticisms.

<sup>18</sup> See s 3(2) of the Administrative Justice Act, Chap 10:28 of 2004. See also *Affretair (Pvt) Ltd v M K Airlines (Pvt) Ltd* 1996 (2) ZLR 15 at para 21–22 where the Court held that administrative action must be ‘procedurally proper, in the sense that the appropriate procedures required by the statute have been followed and that the principles of natural justice have been observed.’

<sup>19</sup> Also see *Hippo Valley Estates Limited and Another v Minister of Environment, Water & Climate* 2018 (HH 235-18, HC 7770/16) at p 5 and *Augar Investments OU v Minister of Environment & Another* 2015 (1) ZLR 502 (H).

<sup>20</sup> 2015 (HC 1017/14) ZWHHC 278.

<sup>21</sup> Albeit briefly and without elaboration, Feltoe makes a similar proposition as follows: ‘It is not clear exactly what is meant by ‘substantively fair’ and this provision will have to be interpreted by our courts. It would seem, however, that the substantive outcome of administrative decisions must be fair and the effect of administrative action must not be unfair. If this is correct it would require the courts to examine the nature of the decision or action in order to evaluate its fairness. ...’ See Feltoe op cit note 17.

The first is that this interpretation conflates the court's authority to conduct a review and an appeal. Feltoe<sup>22</sup> warns that:

The remedy of review must not be confused with that of appeal. The main difference between these two remedies is that in an appeal what is in question is the substantive correctness of the original decision whereas on review the High Court is not delving into the substantive correctness of the decision, but is only determining whether there were any reviewable procedural irregularities or any action which was reviewable because it was *ultra vires* the powers allocated to the tribunal.

Thus, according to Feltoe, administrative law review should not be conflated with an appeal. Similar echoes have been made in comparative jurisdictions.<sup>23</sup> A review on the grounds of substantive fairness, in the way that I conceptualised it above, would seem to suggest that the focus of the court's review would be on the merits and impact of the decision, as opposed to the process of making the decision. This could be perceived as an appeal rather than a review. On that account, my definition of substantive fairness could be criticised and challenged. However, criticism on such basis should be viewed as untenable because the reality of administrative law review on any ground may entail that the court must do more than examining the decision-making process, but also inquire into the merits of the decision. In actual fact, as Hoexter<sup>24</sup> rightly observes, the focus of judicial review in administrative law frequently falls on the decision itself rather than the process of making the decision.<sup>25</sup> This led to Corder's clarion call that:

We need openly to acknowledge that the old approach to distinguishing review from appeal is no longer tenable. It is not necessary, as our courts have now been expressly authorised to determine the reasonableness of administrative action, which must contain a merit-based substantive element. However this is not an appeal nor is it a mere procedural review: perhaps it would be better to describe what is required now, in all honesty, as 'substantive' or 'wide' review.'<sup>26</sup>

Although this call was made in the context of South African administrative law, it also applies with equal measure in the Zimbabwean context, especially in the post 2013 Constitution era. This is because section 68 of the Constitution expressly authorises courts to review administrative action on grounds of reasonableness and substantive fairness, which cannot be achieved without taking into account the merits or impact of the decision. In that sense, my above stated conceptualisation of a review of substantive fairness as an inquiry into the fairness of the impact of

<sup>22</sup> Ibid at p 36.

<sup>23</sup> For example, see *Chief Constable of the North Wales Police v Evans* 1982 (3) ALL ER 141 (HL) at 154d where Lord Brightman said 'judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power'.

<sup>24</sup> See Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 110.

<sup>25</sup> Ibid at p 111, she develops this argument further by stating that 'It is difficult, if not impossible, to tell without entering into the merits of the decision whether sufficient weight was given to a relevant consideration, or whether an ulterior motive was pursued by the decision maker ...'

<sup>26</sup> See Hugh Corder 'Without Deference, With Respect: A Response to Justice O'Regan' (2004) 121 *South African Law Journal* at 443.

the decision is within the parameters of how the court's review powers have been conceptualised under section 68 (1) of the Constitution.

Yet, it must also be acknowledged that the doctrine of separation of powers is one of the pillars upon which the Zimbabwean Constitution rests.<sup>27</sup> In its strict sense, this doctrine precludes judges from pronouncing themselves on the merits of administrative decisions.<sup>28</sup> It confines their inquiry to reviewing procedural fairness as opposed to substantive fairness. However, this is far from the type of separation of powers recognised under the Zimbabwean Constitution. The Zimbabwean separation of powers doctrine is neither strict nor absolute. While the Constitution grants the executive the power to make and implement administrative policies, the judiciary also directly derives its authority from the Constitution to review the substantive fairness of those decisions in order to protect citizens against potential abuse of power.<sup>29</sup> However, as was emphasised by the Zimbabwean Supreme Court in *Affretair (Pvt) Ltd v M K Airlines (Pvt) Ltd*<sup>30</sup> the authority to inquire into the merits of the decision should not be done in a manner which defeats the core of the separation of powers. If not done carefully, a review into the substantive fairness of the decision could easily lead the judges into the policy making terrain where they begin to substitute the wisdom of the administrator with their own, and in the process violate the separation of powers. To avoid that, there is a need for courts to carve out a clear standard of review to be applied in order to maintain a balance between respecting the separation of powers while at the same time protecting people from substantively unfair administrative actions. The principle remains though that a review on the grounds of substantive fairness is an inquiry into the merits and impact of the decision. Such an inquiry is done for purposes of establishing if the decision is substantively fair.

This brings to the fore the following question: what criteria should the courts in Zimbabwe apply in order to evaluate the substantive fairness of an administrative decision in a manner which strikes the balance between respecting the separation of powers and the court's duty to protect individuals from abuse of administrative authority? A good starting point for discussing this question is section 3 (1) of the AJA,<sup>31</sup> which identifies the broad circumstances under which a person is permitted to take an administrative decision on review.

In terms of that provision,<sup>32</sup> any person whose 'rights' or 'legitimate expectations' have been materially and adversely affected by administrative action, is entitled to seek judicial review on the grounds of substantive fairness. In order to identify the appropriate standard of review or factors which the court should

<sup>27</sup> As articulated in the Zimbabwe Constitution *supra* note 4 at s 3(2)(e).

<sup>28</sup> Eric Barendt 'Separation of Powers and Constitutional Government' (1995) *Public Law* 601.

<sup>29</sup> See *supra* not 4 at s 68(1). See also the decision of the Constitutional Court of Zimbabwe in *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* 2017 ZWCC 13 p. 9–11.

<sup>30</sup> 1996 (2) ZLR 15 at p 21–22.

<sup>31</sup> Read together with the Zimbabwe Constitution *supra* not 4 at s 68 (1).

<sup>32</sup> *Ibid.*

consider as part of the review, I propose to discuss separately (a) the review of decisions which adversely affect rights and (b) decisions which affect legitimate expectations.

**(a) Substantive fairness in the context of decisions which affect rights**

Most fundamental rights are not absolute.<sup>33</sup> They may be subject to limitations imposed by way of or as a result of administrative conduct. For instance, every person in Zimbabwe has the right to freedom of trade.<sup>34</sup> However, the exercise of this right is subject to regulation and may be limited through administrative conduct. For example, one must be issued with a licence before they can trade in certain goods such as liquor. Therefore, the right to trade may be limited by a decision of the municipality to refuse issuing an applicant with a liquor licence. Equally, every person has a right to establish and maintain a private educational institution<sup>35</sup> but subject to acquiring a licence to do so. Many other rights in Zimbabwe, including the rights to health care, housing, freedom of assembly, freedom of movement and freedom of the media are subject to regulation and may be limited through administrative conduct.

However, in terms of section 68 (1) of the Constitution, every person has a right to administrative conduct that is substantively fair. Therefore, individuals have a right to take administrative decisions on review on the grounds that the impugned decisions impose unfair limitations on the exercise of the affected rights. As highlighted earlier, the primary focus of the review is not on the process of making the decision but on the merits and impact of the decision itself.

There is nothing in section 68 of the Constitution and in the AJA, which explains the applicable standard of review or factors to be considered when conducting a review on the grounds of substantive unfairness. I propose that reference can be made to section 86 of the Constitution in order to identify these factors. Section 86—known as the limitation clause—sets out the general requirements which must be complied with for any infringement of a constitutional right to be accepted as valid. Limitations or infringements of rights through administrative conduct are not excused from conforming to these requirements and therefore, it is appropriate to refer to section 86 of the Constitution in order to establish factors to be considered when reviewing administrative conduct on the grounds of substantive fairness.

Section 86 (2) of the Constitution states that:

The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom ...

---

<sup>33</sup> Ibid at s 86.

<sup>34</sup> Ibid at s 64.

<sup>35</sup> Ibid at s 75(2).



Thus, one of the requirements is that any limitation of a constitutionally recognised fundamental right must be fair. As discussed earlier, whether a measure is fair or not depends on the particular circumstances of the case. Invariably, this involves weighing the competing interests of the parties involved. The question therefore is, what is the appropriate standard of review, which the court should apply when weighing these interests?

Section 86 of the Constitution identifies a number of factors which must be considered when evaluating the constitutionality of a limitation. These factors are:

- (a) the nature of the right or freedom concerned; (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; (c) the nature and extent of the limitation; (c) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; (d) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and (e) whether there are any less restrictive means of achieving the purpose of the limitation.

When reviewing administrative conduct in order to establish substantive fairness or lack thereof, the court should consider the factors listed above to the extent that they are relevant to an inquiry into the fairness of a limitation. Stripped to its essentials, section 86 requires any limitation of a constitutional right to be done in terms of a law of general application<sup>36</sup> and the limitation must be for a purpose that is considered legitimate in the Zimbabwean constitutional democracy, and the limitation must not infringe the right more than what is necessary to achieve the intended purpose.<sup>37</sup> Therefore, when weighing the interests of fairness against the merits or the impact of the decision, the court should consider: (a) whether in the first place, there is any legitimate purpose which the limitation seeks to achieve; (b) if so, whether the limitation can, objectively speaking, be considered capable of advancing the stated purpose of the limitation; (c) if so, the court should weigh the significance<sup>38</sup> of the infringed right against the importance of the intended aim of the limitation;<sup>39</sup> and (d) where both the right and the aim of the limitation are equally significant to the Zimbabwean constitutional democracy, then the court must review the nature of the limitation. Here, the court should evaluate whether the nature and extent of the limitation does more harm than what is necessary for the achievement of the intended aim of the limitation. Put differently, the court should evaluate whether there are less restrictive means through which the intended purpose could have been achieved.

Implicit in the above are necessity, rationality and proportionality as elements of the standard of review applicable when establishing the substantive fairness of

<sup>36</sup> See Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6 ed (2013) 155–162 for a detailed discussion on this.

<sup>37</sup> For a detailed discussion on this, albeit in the South African context see *Ibid* at 162.

<sup>38</sup> To the Zimbabwean democratic system.

<sup>39</sup> See *S v Makwanyane* 1995 (3) SA 391 at para 104; and *S v Bhulwana* 1996 (1) SA 388 (CC) at para 18.

an administrative decision. The first leg of the test, where the court assesses if there is a legitimate aim for the limitation, is essentially a necessity test whereas Craig<sup>40</sup> puts it, the court has to be satisfied that there is a real or pressing need to limit the right. The second leg of the inquiry, where the court evaluates whether the infringement is objectively capable of furthering the achievement of the purpose of the limitation, is a rationality test.<sup>41</sup> The last leg of the inquiry, where the court evaluates the nature and extent of the limitation is in essence a proportionality test. Here, the court seeks to establish whether the impact of the decision does more harm or imposes more restrictions than is necessary. When testing the proportionality of the decision, regard must be had to the nature of the right.<sup>42</sup> The more weight the right carries in the country's constitutional democratic system, the least possible restriction should be permitted. Thus, the standard of review on the grounds of fairness seems to consist of necessity, rationality and proportionality. Ultimately, the review turns on proportionality implying that administrative conduct which imposes disproportionate restrictions on the exercise of a constitutional right is substantively unfair.

However, it must be noted that the requirements set out in section 86 apply only to decisions which limit fundamental rights that are recognised in the Constitution's Declaration of Rights.<sup>43</sup> Review of administrative conduct on the grounds of substantive fairness applies not only to decisions which limit constitutional rights but also those which adversely affect any other rights. This raises the question whether the requirements set out in section 86 should also be applied when reviewing administrative decisions which limit rights that are not constitutional in nature but are recognised in other laws that are applicable in the municipal legal system. I propose a differentiated approach, whereby courts strictly apply the requirements set out in section 86 when reviewing substantive fairness of conduct which infringes constitutional rights; and when reviewing decisions which affect non-constitutional rights, the courts should apply section 86 as guidelines rather than rules.

The rationale for this differentiated approach is that the Zimbabwe Constitution attaches special protection to constitutional rights by expressly stating that any limitation of these rights must comply with the requirements set out in section 86. This is because the exercise of these rights is at the core of the Zimbabwean constitutional democracy. It would therefore not be proper to apply the same rigorous review (outlined in section 86) when judging limitations of non-constitutional rights. However, by virtue of the principle of the rule of law<sup>44</sup> non-constitutional rights must also be protected. But this cannot be done by strictly applying the requirements in section 86 because doing so would be giving constitutional status

<sup>40</sup> Paul Craig *Administrative Law* 6 ed (2008) 586.

<sup>41</sup> Hoexter op cit 24 at 340.

<sup>42</sup> Craig op cit note 40.

<sup>43</sup> See *supra* note 4 at s 86(2).

<sup>44</sup> Enshrined in the Zimbabwe Constitution *supra* note 4 at s 3(1)(b).

to rights that are non-constitutional in nature. It is on this premise that I suggest that where legislation does not indicate factors to be considered when reviewing the substantive fairness of administrative conduct, courts should apply section 86 of the Constitution as guidelines rather than strict rules. In practice, that may mean that although the court must insist that the conduct must meet the test of necessity, rationality and proportionality (as is the case with limitation of constitutional rights), the extent of justification required for limiting the rights should be less than that which is required in cases which involve constitutional rights.

**(b) Substantive fairness in the context of decisions which affect legitimate expectations**

Legitimate expectations is a legal term, originally developed in English law, which is used to refer to the existence of an expectation that either a certain procedure will be adopted before a decision is made or that a certain type of a decision will be made. Such expectations may arise from a range of situations which include an express assurance or promise by the administrator, a settled practice or an established policy.<sup>45</sup> Whether a legitimate expectation exists or not is a question of fact, which is determined by the court on a case by case basis. However, there are at least two types of legitimate expectations. One category comprises of expectations that a certain procedure will be adopted when making a decision either because of settled practice or assurances given by the administrative agency. These are called procedural legitimate expectations.<sup>46</sup>

The second category is that of expectations which are of a substantive nature. These are expectations that a substantive benefit will not be withdrawn or will be conferred as a result of the impending administrative conduct.<sup>47</sup> For instance, in *Goba v Zimra*,<sup>48</sup> applicant was a Zimbabwean citizen who had been a lawful immigrant living in Namibia for 12 years. He took on review the decision by the customs authorities to deny him rebate on his imported motor vehicle. The Court<sup>49</sup> held that, upon his return to take up permanent residence in Zimbabwe, applicant had a substantive legitimate expectation (created by the existing customs regulations and settled practice) that he would be entitled to the immigrant rebate in respect of his personal effects including one motor vehicle.

<sup>45</sup> Hoexter op cit 24 at 421. Also see *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91 at para 35.

<sup>46</sup> See for instance the South African case of *Claude Neon Ltd v City Council of Germiston* 1995 (3) SA 710 (W) at 719H.

<sup>47</sup> John Campbell says 'Substantive legitimate expectations are the promise of actual advantages such as a licence, and are to be differentiated from procedural legitimate expectations, which are lesser promises of merely a fair procedure before a decision is made'. See John Campbell 'Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa' (2003) 120 *South African Law Journal* at 293.

<sup>48</sup> *Goba v ZIMRA and Another* 2015 4561/12(ZWHHC) 159.

<sup>49</sup> *Ibid* at 6.

Substantive legitimate expectations cannot be enforced or protected by insisting on procedural fairness only but also substantive fairness.<sup>50</sup> An inquiry into substantive fairness of administrative conduct is a review of the impact of the actual decision on the parties as explained earlier. It is not a review of the decision-making process. It seems therefore that the fair treatment of substantive legitimate expectations is to be enforced through the right to substantive fairness, more than merely insisting on the right to procedural fairness.

However, it cannot be taken for granted that the right to substantively fair administrative conduct implies that substantive legitimate expectations are enforceable in Zimbabwe. Paul Campbell<sup>51</sup> observes that:

The question as to whether or not legitimate expectations can be substantively protected is one of the most resilient controversies in modern public law. That it is not an easy question is illustrated both by the length of time it has taken for answers to emerge in various Commonwealth jurisdictions that inherited the concept from English law, and by the different solutions adopted. The High Court of Australia and the Supreme Court of Canada have decided that substantive protection is not possible.

Although Campbell and other scholars<sup>52</sup> identify Zimbabwe as one of the jurisdictions where the court has held that the law permits the enforcement of substantive legitimate expectations, this pronouncement was made by a tax court and it was prior to the constitutional change in 2013.<sup>53</sup> It is therefore critical to examine the jurisprudence in the post-2013 Constitution, and establish if there is any substantive jurisprudence which confirms the notion that substantive legitimate expectations are enforceable in Zimbabwe.

The case of *Goba v ZIMRA* seems to be the only case thus far, in the post 2013 Constitution era, which has given the clearest indication on the enforceability of substantive legitimate expectations. In this case, Hungwe J held that:

The right to benefit from the provisions of the Regulations has created, in my view, a substantive legitimate expectation for permanent returning residents to Zimbabwe to enjoy the associated benefits which flow from the Regulations. The authorities administering the regulations must do so rationally, fairly, non-arbitrarily and in an unbiased manner. If a denial of a legitimate expectation in a given case amounts to denial of a right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on well-known grounds of review.<sup>54</sup>

It therefore seems clear that a decision which disappoints substantive legitimate expectations is reviewable in Zimbabwe. However, this case was decided upon by

<sup>50</sup> For instance, in *Goba v ZIMRA* (Ibid), even though the decision-making process may have been conducted in accordance with all the procedural requirements of fairness, it still resulted in a substantively unfair decision.

<sup>51</sup> Campbell op cit 47 at 292.

<sup>52</sup> Such as Rebecca Williams 'The Doctrine of Legitimate Expectation May Prevent the Revenue Authorities from Reneging on an Undertaking to a Taxpayer' (2001) *South African Law Journal* at 242.

<sup>53</sup> See ITC 1674 (2000) 62 SATC 116.

<sup>54</sup> Op cit 48 at p 6.

the High Court, which in Zimbabwe, does not necessarily set precedent<sup>55</sup> and is not the final authority on constitutional interpretation. In view of this, and considering that there are powerful counter-arguments which have been expressed against the enforcement of substantive expectations, it may be necessary to engage with these criticisms before coming to a conclusion that substantive legitimate expectations are indeed enforceable in the Zimbabwean administrative system under the right to substantively fair conduct.

One of the criticisms is that by enforcing substantive legitimate expectations, the courts would be allowing legitimate expectations to harden into substantive rights.<sup>56</sup> The argument is usually that the courts must not allow legitimate expectations to be enforced as if they were rights as doing so would conflate the legal distinction between rights and legitimate expectations. The second criticism is that giving courts the power to enforce substantive legitimate expectations would undermine the authority of public officials to exercise discretion.<sup>57</sup> It is a basic tenet of every administrative system that public officials should have discretion and that includes the power to change policies and practices in order to respond effectively to contemporary challenges and realities. The argument is therefore that insistence on the enforcement of substantive expectations may 'ossify administrative policy-making' and that it may therefore introduce a 'chilling effect' on the administrative process.<sup>58</sup>

The point which seems to be missed by the above arguments is that the overall purpose of the right to administrative justice is to control the exercise of public power and protect people from abuse of public power which may result in unfair decisions being made. Therefore, the central question in a review that is conducted on the grounds of substantive fairness must be whether the impugned decision is fair or not. There are a number of cases where the courts have found that the failure to enforce substantive expectations of the applicant had resulted in an unfair decision. For example, in the English case of *Wells v Minister of Housing and Local Government*<sup>59</sup> applicant had been told that he did not need to obtain planning permission to erect the building he intended to erect. Applicant proceeded to erect the building on the basis of the representation made to him. Allowing the Minister to go back on that representation would result in a substantively unfair decision against the applicant, who had already built his property without a planning permission. In another English case of *Robertson v Minister of Pensions*<sup>60</sup> the applicant

<sup>55</sup> In the sense that another division of the High Court can make a different interpretation. For example, the decision by Bere J in *Kombayi and Others v Minister of Local Government* 2016 HB-57-16, HC 2371-15 (ZWBHC) 259 which held that the Minister did not have powers to suspend and or remove a Mayor was contradicted by Dube J in *Manyenyeni v Minister of Local Government* HH-274-16 at p 8-9.

<sup>56</sup> Campbell op cit 47 at 294.

<sup>57</sup> Ibid.

<sup>58</sup> See Søren J Schönberg *Legitimate Expectations in Administrative Law* (2000).

<sup>59</sup> 1967 (2) All ER 1041, 1967 (1) WLR 1000. Also see *Lever Finance Ltd v Westminster (City) London Borough Council* 1970 (3) All ER 496, 1971 (1) QB 222.

<sup>60</sup> 1948 (2) All ER 767, 1949 (1) QB 22.

had been assured by the administrators that his disability was accepted as attributable to war service and he acted on it by not getting his own medical opinion. In the Zimbabwean case of *Goba v ZIMRA*, the applicant would have been unfairly treated if the customs agency had been allowed to go back on its own regulations which grant a rebate to returning residents who meet certain requirements. There are also instances where the failure to uphold the substantive legitimate expectations was found not to have resulted in an unfair decision.<sup>61</sup>

The outcome of any inquiry into the fairness of a decision depends on the specific circumstances of each case. A blanket excuse or rule against the enforcement of substantive expectations, without examining the circumstances of the case, is therefore incompatible with the right to substantively fair administrative conduct. More so, such a rule would be unsustainable in a jurisdiction such as Zimbabwe, where substantive fairness is expressly provided for as a ground of review. On that basis, substantive fairness can be applied as a ground of review to evaluate the fairness of a decision which adversely affects one's substantive legitimate expectations. Therefore, the question should not be: whether or not substantive fairness can be applied as a ground of review in Zimbabwe when challenging a decision which adversely affects substantive expectations. Rather the question should be: how should courts conduct such an inquiry without ossifying administrative policy making and without violating the doctrine of separation of powers, particularly the principle that courts should accord due respect to both the authority and competence of the administrator to exercise discretion fairly?

This leads to the next question, which is how should courts determine whether the failure to uphold substantive expectations has resulted or would result in an unfair decision without undermining the separation of powers doctrine? In order to answer this question, perhaps the best point of departure is a consideration of how English courts have dealt with the enforcement of substantive legitimate expectations, since the concept of legitimate expectations is originally an English law phenomenon.

Cora Hoexter has identified three approaches which have been taken by English courts.<sup>62</sup> She identifies them as the direct approach, the proportionality driven approach and the *Wednesbury* (reasonableness) approach. It is worth it to discuss these approaches and evaluate if they can be useful for a Zimbabwean court.

The 'direct approach' was applied by the Court of Appeal in *R v North and East Devon Health Authority, ex parte Coughlan (Coughlan)*.<sup>63</sup> As Geo Quinot notes,<sup>64</sup> it is referred to as the direct approach because the existing substantive legitimate expectation is juxtaposed and weighed against any public or state interests which demand the frustrations of the expectation. The facts in *Coughlan* were that a

<sup>61</sup> See for example, the English case of *Preston v Inland Revenue Commissioners* 1985 (2) All ER 327.

<sup>62</sup> Hoexter op cit 24 at 434.

<sup>63</sup> 2000 (3) ALL ER 850 (CA).

<sup>64</sup> In Geo Quinot 'The Developing Doctrine of Substantive Protection of Legitimate Expectations in South African Administrative Law' (2004) *South African Public Law* 556.

Miss Coughlan was living with severe disabilities and she was receiving care in a national health facility. She had received several assurances from the authority that she would be able to live out her days in the facility. However, the authority later on decided to close down the facility for reasons that the costs of running the facility were becoming excessive. Miss Coughlan sought judicial review of the authority's decision and the premise of her argument was that the decision was unfair because the authority had induced in her a legitimate expectation that she would be able to live and receive care in the facility for the rest of her life. In dealing with this matter Lord Woolf MR accepted that Miss Coughlan had a substantive legitimate expectation which could only be disappointed or withdrawn if 'there is a sufficient overriding interest to justify a departure from what has been previously promised.'<sup>65</sup> A similar test had been applied earlier on in *R v Secretary of State for the Home Department, ex parte Khan*<sup>66</sup> where the government had made undertakings to the effect that if certain conditions are met, one would be allowed entry into the United Kingdom. The court held that the government could change those conditions only after affording the affected persons a hearing and only if there is an overriding public interest which requires those conditions to be changed notwithstanding the existing undertakings.<sup>67</sup>

Thus, according to this approach a substantive legitimate expectation can be disappointed only if there is an interest to be protected which is so significant to the extent that it trumps the importance of the existing expectation. Put differently by Quinot,<sup>68</sup> the court's verdict should turn on the outcome to the 'question whether there are any public interest considerations militating against the substantive protection of the [legitimate] expectation.' This approach therefore suggests that where a decision which adversely affects a substantive legitimate expectation has been taken on review on the grounds of substantive fairness, the court must engage in a three-step process of inquiry. First, the court must establish if indeed there is a substantive legitimate expectation. If a substantive legitimate expectation exists, the second step is for the court to inquire if there is a clear interest which justified the withdrawal or disappointment of the representations which had been made. The third step is that the court must determine fairness by weighing the significance of the representation (substantive legitimate expectation) against the significance of the stated interest which the public authority sought to protect by withdrawing the representation earlier made.

This approach has been heavily criticised by scholars,<sup>69</sup> on the basis that the contemplated exercise of weighing the significance of the representation against the stated public interest is somewhat lacking in precision. The standard of review to be applied in that balancing exercise remains unclear.

<sup>65</sup> *Supra* note 63 at para 58.

<sup>66</sup> 1985 (1) All ER 40 (CA).

<sup>67</sup> *Ibid* para 46b.

<sup>68</sup> Quinot *op cit* 64 at 557.

<sup>69</sup> See Quinot *op cit* note 64 at p 558. Also see Paul Craig and Søren J Schønberg 'Substantive Legitimate Expectations after Coughlan' (2000) *Public Law* 700.

This led to other scholars<sup>70</sup> preferring the second approach where the court applies the proportionality test in order to evaluate the fairness or unfairness of the decision to frustrate substantive legitimate expectations. This approach was laid out in the case of *R (Abdi and Nadarajah) v Secretary of State for the Home Department*,<sup>71</sup> where Lord Laws LJ stated that a public authority can be permitted to go back on its promise or past practice only if the public official has legal authority to do so and if the decision to withdraw the promise is proportionate.<sup>72</sup> It seems that the court would have to engage in a three-step process of inquiry. First is to inquire into whether there is a substantive legitimate expectation and if so, whether there is any legitimate aim or interest which demanded that the public authority had to go back on its earlier promise. The second stage of the inquiry would be to assess if the withdrawal of the undertaking is proportionate. Proportionality is evaluated by assessing if the withdrawal of the undertaking does not cause more harm than is necessary to advance the legitimate aim which the public authority seeks to protect or achieve by going back on its promise.<sup>73</sup> Where the withdrawal of the earlier made promise or the extent of the withdrawal of the undertaking is found to be more drastic than is necessary to accomplish the stated legitimate aim, then the decision should be deemed to be substantively unfair.

The third approach is where the court applies the *Wednesbury* principle of rationality to assess the substantive fairness of administrative conduct which results in the disappointment of a substantive legitimate expectation. The test was laid out in *Council of Civil Service Unions v Minister for the Civil Service*<sup>74</sup> (CCSU) where Lord Diplock held that a decision by an administrator to go back on his or her earlier promise would be deemed unfair if such a decision is found to be irrational in the sense that it is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'<sup>75</sup> A similar approach was taken by Hungwe J in the Zimbabwean case of *Goba v ZIMRA*.<sup>76</sup> Thus, before the administrator decides to go back on its earlier undertaking, it must consult the party to whom the undertaking was made. Further and more crucial to the current discussion is the requirement that, before making the decision, the administrator must give adequate weight to the fact that there is an existing undertaking to deliver or maintain a substantive benefit to the party who may be affected by the decision.<sup>77</sup> After taking into

<sup>70</sup> Such as Paul Craig *Administrative Law* 5 ed (2003) 655–656.

<sup>71</sup> 2005 EWCA Civ 1363.

<sup>72</sup> *Ibid* para 68.

<sup>73</sup> Cora Hoexter 'Standards of Review of Administrative Action: Review for Reasonableness' in Jonathan Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) 64.

<sup>74</sup> 1985 AC 374 (HL).

<sup>75</sup> *Ibid* at para 410D–H.

<sup>76</sup> *Supra* note 48 at p 8.

<sup>77</sup> Schönberg *op cit* note 58 at p111. Also see *The Bath Society v Secretary of State for the Environment* 1991 (1) WLR 1303 (CA) at p 1310H–311F and *Jacobs v Waks* 1992 (1) SA 521 (A) at p 5491–551C.



account such considerations, and if there is a logical reason to withdraw the undertaking, then the decision will not be deemed to be unfair.

This approach has been criticised for setting the bar too high to the extent that several unfair decisions may pass the rationality test by virtue of being not so outrageously illogical.<sup>78</sup> Quinot expresses his reservation about this approach as follows:

It is apparent that this approach results in a particularly 'light' form of review—the administrator's balancing of the opposing interests will not easily be disturbed since the review court will, as a general proposition, not closely assess for itself the relative importance of the interests involved, especially not those informing the public (policy) dimension of the decision.<sup>79</sup>

These concerns led to the proposition that, in cases where the decision will undermine the exercise of a fundamental right, the court must also examine if the decision is reasonable, in addition to the test of rationality outlined above. Lord Bingham endorsed this proposition in *R v Ministry of Defence, ex parte Smith*<sup>80</sup> when he adopted the following submission:

The Court may not interfere with the exercise of an administrative discretion on substantive grounds save where the Court is satisfied ... that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the Court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.<sup>81</sup>

However, it seems that the suggested more rigorous test is to be applied in cases where human rights are affected and this led John Campbell<sup>82</sup> to ask rhetorically: '[Given that] these decisions all deploy the 'Wednesbury method' with a lowered 'threshold of public law irrationality' because of a human rights context, ... could that threshold not also be lowered for legitimate expectations?'

Campbell<sup>83</sup> proceeded to propose that the more searching standard of review which is applied in human rights cases should also be applied in cases where decisions affect substantive legitimate expectations. To which Quinot<sup>84</sup> elaborately responded as follows:

<sup>78</sup> See Lord Bingham MR's remarks in *R v North and East Devon Health Authority, ex parte Coughlan* (*Coughlan case*) at 647E. Also see *R v Inland Revenue Commissioners, ex parte Unilever plc* 1996 STC 681 (CA) at 692d.

<sup>79</sup> Quinot op cit 64 at 559.

<sup>80</sup> 1996 QB 517 (CA).

<sup>81</sup> *Ibid* at 554E–G. Lord Woolf developed the argument further in *R v Lord Saville of New Digate, ex parte A*: 1999 (4) All ER 860 (CA) at 872e where he noted that '[I]t is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights.'

<sup>82</sup> Campbell op cit 47 at 313.

<sup>83</sup> *Ibid*.

<sup>84</sup> Quinot op cit 64 at 561.

... it is not clear why substantive legitimate expectation cases call for heightened scrutiny upon review. Campbell justifies this lowering of the review threshold with reference to the similar lowering in cases affecting human rights. However, the reason for such similarity of approach is not clear. In fact, logic would suggest the opposite. Fundamental to the concept of legitimate expectations is the idea that the interest involved is not (yet) a right, only something less than that, but still worthy of protection. Affording substantive legitimate expectations the same protection afforded in cases where human rights are at stake, because of the fact that such protection is afforded in the latter instances, seems to be contrary to the stated fundamental premise of the legitimate expectation doctrine.

Quinot does not elaborate on why substantive legitimate expectations should not be accorded the same protection as fundamental rights, save for arguing that the distinction between the two must be maintained. His reservations seem to emanate from a traditional formalistic approach to the application of legal rules, an approach which does not necessarily put justice at the centre of the application of law. Admittedly, there are formal rules to be followed when interpreting the meaning of provisions under section 68 of the Constitution, the right to administrative justice. However, the application of those rules (as set out in section 46 of the Constitution) requires courts always to prioritise the object and purpose of the Bill of Rights in order to give 'full effect to the rights and freedoms enshrined' therein.<sup>85</sup> The essence of the rights guaranteed in section 68 of the Zimbabwean Constitution is to guarantee administrative justice with regards to conduct which affects both rights and legitimate expectations. In part, this entails what Lord Laws<sup>86</sup> described as guaranteeing the citizens 'good administration,' which can be achieved only when authorities are required to deal straight-forwardly and consistently with the public. The Constitution of Zimbabwe identifies 'good government' as both a constitutional value and a fundamental principle 'which bind the State and all institutions and agencies of government at every level'.<sup>87</sup> In addition to this, the right to administrative justice seeks to constitutionalise a culture of justification,<sup>88</sup> which requires public authorities to account for their conduct and demonstrate that their decisions are reasonable in a democratic state that is based on the principles of the rule of law and good governance.

These intentions will be defeated if public authorities are allowed to depart from settled practice or dishonour their promises, without being called to account, simply because the settled practice or the promises given are not human rights but are legitimate expectations. Applying the *Wednesbury* principle of rationality may

<sup>85</sup> See *Mawere v Registrar General* 2015 ZW 04 (CC) at para 20. Although this case concerns the enforcement of the right to citizenship, it thoroughly discussed principles and rules of constitutional interpretation that are applicable in Zimbabwe. Also see *Rattigan v Chief Immigration Officer* 1994 (2) ZLR 54 (S) at 57 F-H.

<sup>86</sup> In *R (Abdi and Nadarajah) v Secretary of State for the Home Department* 2005 EWCA Civ 1363 (*Nadarajah case*) at para 68.

<sup>87</sup> *Supra* note 4 at s 3(2).

<sup>88</sup> This is Etienne Mureinik's proposition in the context of South Africa. See David Dyzenhaus 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' 1998 *South African Journal on Human Rights* at 32-33.

be as good as not holding them to account because, as indicated above, this principle is far less searching and sets a very low bar of justification. In order to achieve administrative justice, promote good government and to foster the intended culture of justification, a solid and rigorous standard of review of administrative conduct is required. The modified *Wednesbury* approach, proposed by scholars like Campbell is far more solid and rigorous as a standard of review. As indicated above, it requires the court to engage in an inquiry which assesses (a) the rationality of the decision and (b) the reasonableness of the decision, by examining if the decision to depart from settled practice or withdraw the promise is proportionate.

This approach does not deny public authorities their right to exercise discretion, neither does it preclude them from changing policies to suit contemporary realities. It seeks to ensure that the ends of administrative justice, which include promoting good government and a culture of justification, are protected by insisting that public authorities do not depart from their settled practice or dishonour their promises without a good reason to do so. The fact that administrative conduct adversely affects substantive expectations (as opposed to fundamental rights), should not on its own preclude courts from applying effective standards of review to hold public authorities accountable, especially in jurisdictions such as Zimbabwe where the Constitution expressly guarantees good government as a constitutional value, and administrative justice as a right.

#### 4. CONCLUSION

Given what I stated as the objective for this chapter, it is appropriate to conclude by addressing the question whether the express inclusion of substantive fairness as a ground of review in section 68 (1) of the Constitution should be seen as an introduction of a new standard of review in the Zimbabwean administrative law review system. Conceptually, substantive fairness as a ground of review does not seem to be adding anything new to the fabric of standards of review applicable in Zimbabwe prior to the 2013 Constitution. As shown in the foregoing discussion, a review on the grounds of fairness deploys the same principles of rationality and proportionality that are applicable under the test of reasonableness.

However, the express inclusion of substantive fairness as a ground of review serves a practical purpose of lending more legitimacy to the courts' role to protect people from abuse of power by not shying away from reviewing the merits of administrative decisions. Zimbabwean courts have a chequered tradition of exercising (sometimes unmerited) deference to the executive. In doing so, the courts have traditionally applied a strictly procedural approach to administrative law review, especially in cases which are politically sensitive. A case in point is *Tsvangirai v Registrar-General*.<sup>89</sup> Voting in a general election had been extended for a third day. The applicant (who was leader of the main opposition party, with the majority of its supporters in urban areas having been denied an opportunity to vote) was dis-

<sup>89</sup> 2002 (1) ZLR 251 (H).

satisfied with the way in which the voting had been conducted on the third day. He requested the Registrar General and the Electoral Commission to extend voting to a fourth day and the request was refused. Applicant took the Registrar-General and the Electoral Commission on review. In disposing this matter, the Court interpreted its review powers to be confined to instances where there is illegality, irrationality or procedural impropriety. As long as Applicant was consulted (through his agents) before the Electoral Commission made the decision, then there was no procedural impropriety, the court reasoned. This is notwithstanding that there was a *prima facie* evidence pointing towards that the decision was substantively unfair to Applicant and his supporters. Ironically, the 2013 Constitution was negotiated between the governing party ZANU PF and applicant's party MDC.

It is therefore not far-fetched to assume that the negotiators made sure that substantive fairness is expressly included as a ground of review, in order to address jurisprudential constraints such as those that had been experienced by applicant in *Tsvangirai v Registrar-General*. Whether this is going to be effective depends on how the courts will interpret their role in light of section 68 of the Constitution which expressly demands them to review the substantive fairness of an administrative decision. So far, the High Court in *Goba v ZIMRA* has indicated its preparedness to scrutinise the merits of administrative conduct, using substantive fairness as a ground of review.

# The State of Administrative Law in Malawi: Systems, Structures and Emerging Issues

REDSON E. KAPINDU\* AND FIDELIS E. KANYONGOLO†

## ABSTRACT

Administrative law is an essential feature of any functioning democracy. It plays a very important role in ensuring that those who wield public power and or perform public functions are held to account in the exercise of their powers and functions in Malawi. This chapter presents a general overview of the current state of administrative law in Malawi. It analyses the accessibility of administrative justice and how administrative law fosters participatory democracy in

Malawi—in particular having regard to participatory processes in rule-making and rule application. The chapter also interrogates the effectiveness of quasi-judicial or extra-judicial administrative justice mechanisms in Malawi. Overall, the chapter emphasises the centrality of section 43 of the Constitution of Malawi, which guarantees the right to administrative justice. The chapter highlights the paradigm shift brought by this right, to the administrative law discourse.

## 1. INTRODUCTION

Administrative law is a branch of public law that is concerned with the composition, procedures, powers, duties, rights and liabilities of the various organs of government, public and other bodies that are engaged in administering public functions.<sup>1</sup> The primary purpose of administrative law is to keep the exercise of the powers of public officials, or officials discharging public functions, within legal bounds. Mureinik captures it succinctly when he states that the application of administrative law is triggered wherever power is wielded, be it in central government or local government, in corporate management or trust administration, in a synod or faculty board.<sup>2</sup>

Whilst observing that administrative law is an important tool in controlling and regulating the exercise of public power in a liberal constitutional democracy, and thus preventing abuse of power, Adelman worries that administrative law may easily lead to a preoccupation with due process rather than wider questions of legitimacy and accountability.<sup>3</sup> A good body of administrative law, however, must seek to invoke due process to secure the legitimacy of substantive justice. Seidman

\* Visiting Associate Professor of Law, University of Johannesburg; Judge, High Court of Malawi.

† Associate Professor of Law, University of Malawi.

<sup>1</sup> Anthony Bradley and Keith Ewing, *Constitutional and Administrative Law* (2007) 657.

<sup>2</sup> Etienne Mureinik, 'Administrative Law in South Africa' (1986) 103 *South African Law Journal* 615.

<sup>3</sup> Sammy Adelman, 'Accountability and Administrative Law in South Africa's Transition to Democracy' (1994) 21 *Journal of Law & Society* 317–328, 318.

astutely posits that '[t]he body of rules subsumed under the phrase administrative law is ... among the most important institutions for the maintenance of legal-rational legitimacy.'<sup>4</sup> Administrative law is therefore central in ensuring the deepening of constitutional democracy. As Akech has stated, 'the establishment and implementation of elaborate regimes of administrative law (containing principles, procedures, and remedies that circumscribe the exercise of both public and private power) promise to contribute to the realization of democratic governance in African countries.'<sup>5</sup>

This chapter proceeds from this general conception of administrative law and its role in society. The chapter presents a general overview of the current state of administrative law in Malawi. Its particular focus is on the accessibility of administrative justice and participatory democracy in administrative law (rule-making and application); and the effectiveness of non-curial (quasi-judicial or extra-judicial) administrative justice mechanisms.

The chapter is divided into three main parts. In the first part, the chapter addresses the accountability question. It explores the role that administrative law plays in keeping duty bearers, particularly public authorities, accountable for the manner in which they exercise their powers and functions. The second part addresses some nuanced or emerging issues in Malawian administrative law. These include the extent to which administrative law may apply to the exercise of public functions by private actors; issues of judicial deference in relation to administrative justice and novel or emerging remedies in administrative law. Lastly, the paper addresses alternative avenues to judicial review for administrative justice in Malawi.

## 2. ISSUES WITHIN JUDICIAL REVIEW

### (a) *Administrative review, 'privatised' public power and private power*

When courts apply and enforce administrative law, and in the process engage in judicial review of administrative action, their historic focus has been on the declaration and enforcement of the law which determines the limits and governs the exercise of public power. The mainstream approach to administrative law is that it applies to situations where public power is exercised by public officials.

The question arises however, whether administrative law could also apply in cases where the exercise of public power has been privatised. It is useful to point out that Malawi generally applies English administrative law principles although, as this paper demonstrates below, such principles ought to be viewed with great circumspection in view of section 43 of the Constitution which has introduced some radical shifts in Malawian administrative law. The section provides that every person in Malawi has the right to 'lawful and procedurally fair administrative

<sup>4</sup> Robert Seidman, 'Administrative Law and Legitimacy in Anglophonic Africa—A Problem in the Reception of Foreign Law' (1970) 5(2) *Law & Society Review* 161–162.

<sup>5</sup> Migai Akech, 'Globalization, and the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa: Realities, Challenges, and Prospects' (2013) 20(1) *Indiana Journal of Global Legal Studies* 339 and 343.

action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened.<sup>6</sup> The section further provides that every person has the right to be given 'reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected.'<sup>7</sup>

Buckland & Higginson point out that in the English context, in cases where the source of the relevant power is neither statutory nor contractual, courts have looked to the nature of the power in order to determine whether private bodies are subject to judicial review. They argue that, where the power can properly be characterised as 'public' in nature, then the exercise of such power is subject to judicial review. Thus, in *R v Panel on Take-Overs and Mergers; Ex-parte Datafin*<sup>8</sup> Lloyd, LJ held that the source of the power will often be the decisive factor, but that it is still helpful to look at the nature of the power. The Court stated that if the exercise of a body's functions have public law consequences, this may suffice to bring the body within the reach of judicial review.<sup>9</sup> Likewise, Chirwa argues against over-reliance on an institutional approach to administrative law as public powers are increasingly also exercised by private actors.<sup>10</sup>

A good example of private entities whose functions are of a public character and whose conduct ought to be covered by administrative law are political parties. Bradley & Ewing observe that

[c]entral to the role of modern democracy are political parties: they provide the policies and personnel of government (and opposition) and have other important functions as well ... Yet political parties remain voluntary associations in the eyes of the law: bodies exercising a public function but governed by private law.<sup>11</sup>

In Malawi, political parties, that are likewise essentially private bodies, are governed by both public as well as private law. For instance, political parties that receive State funding in terms of Section 40(2) of the Constitution, are subjected to the rigours of the Public Finance Management Act in the handling of funds from the State in the same manner as any public entity. Again, the Political Parties Act of 2018 imposes wide-ranging obligations of a public character on political parties which are a matter of administrative law's concern. Political parties are thus regulated and monitored by various statutory authorities including the Registrar of Political Parties and the Auditor General, among others. The conduct and (or) decisions of political parties in respect of some of their statutory obligations, therefore, are or ought to be judicially reviewable notwithstanding that they remain, in essence, private associations.

<sup>6</sup> Section 43(a).

<sup>7</sup> Section 43(b).

<sup>8</sup> 1987 1 QB 81 5, at p. 847.

<sup>9</sup> *Ibid.*

<sup>10</sup> Danwood Chirwa, 'Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles' (2011) 55(1) *Journal of African Law* 105–127 and 111.

<sup>11</sup> Bradley & Ewing, *supra* note 1, p. 162.

In the case of *Chioza v Board of Governors of Marymount Secondary School*,<sup>12</sup> the issue of the amenability to administrative law review of private entities discharging public duties fell for consideration. The Court held that ‘while the governors may be performing some private law duties in the running of the school, I think that they fall within the public domain when they perform such functions as the admission or expulsion of the students from the school and so render their decisions in that respect susceptible to judicial review.’ The conclusion therefore is that public power exercised by private entities (privatised public power) in Malawi is amenable to administrative law review.

Further questions arise as to whether there are instances where administrative law review may apply even to cases which concern the exercise of private power, perhaps where the private power has a public character. In *W.K. Saukila v NICO*,<sup>13</sup> the High Court took the approach that the provisions on administrative justice under section 43 of the Constitution do not apply to administrative disputes that are of a private character. The Judge was of the view that the application of section 43 of the Constitution did not extend to private bodies. It seems, however, that in the case of *Ngwenya & Gondwe v Automotive Products Limited*,<sup>14</sup> the Industrial Relations Court (IRC) took a different approach. The Chairperson of the IRC (CP), Hon. Mkandawire, faulted the reasoning of the High Court in *W.K. Saukila v NICO*. He pointed out that section 43 is part of the Constitution and that the Constitution does not discriminate between those in the public sector and private sector. He observed that the Constitution did not say that only those in the public sector are entitled to administrative justice. He was of the view that to hold that section 43 only applied to employees in the public service, or that it only referred to the use of executive powers, would be tantamount to ‘constitutional suicide’.

This paper agrees with the approach of Mkandawire, CP in the *Ngwenya case* although this was a decision of a subordinate court. Therein lies a difficulty as it does not seem that there is any decision of the High Court or indeed that of the Supreme Court of Appeal that clearly deviates from the *Saukila* decision. A decision from which parallels may perhaps be drawn is the Supreme Court decision in *Air Malawi Ltd v Ombudsman*.<sup>15</sup> In that case the Malawi Supreme Court of Appeal clarified that in terms of section 123 of the Constitution the role of the Ombudsman is to investigate the bureaucratic unfairness committed either advertently or inadvertently by public or private officials and agencies. This wide conception as regards the breadth of the Ombudsman’s jurisdiction has also recently been echoed by the same court in *State v Ombudsman ex parte Principal Secretary for Finance and 2 others*.<sup>16</sup>

<sup>12</sup> [1996] 19 MLR 109. See also *Mangani v Trustees of Malamulo School of Medical Sciences* civil cause no 356 of 1992 (unreported).

<sup>13</sup> Civil Cause No. 117 of 1997.

<sup>14</sup> Matter No. 180 of 2000 (IRC).

<sup>15</sup> MSCA Civil Appeal No. 1 of 2000.

<sup>16</sup> MSCA Civil Appeal No. 24 of 2017 (decided on 11th February 2019).



Thus, whilst the general common-law position is that the jurisdiction of the Ombudsman is confined to issues of maladministration in the public sector, the Supreme Court of Appeal has taken a wide approach that extends the same to the private sector in respect of section 123 of the Constitution. Therefore, there seems to be no justification for confining the application of section 43 of the Constitution to the public sector when the right is guaranteed for every person in respect of whom administrative action has been taken.

Interestingly though, in the *Ngwenya case*, the IRC observed that the phrase 'administrative justice' was not to be confused or used synonymously with the phrase 'administrative law'. The IRC held the view that there is a dividing line between 'administrative justice' under section 43 of the Constitution and 'administrative law' as commonly understood. We argue that this approach is incorrect. Clearly section 43 of the Constitution espouses administrative law principles and it gives those principles the status of supreme law. As Chirwa rightly observes, section 43 of the Constitution has 'revolutionized' administrative law.<sup>17</sup> Among other things, it provides for a new basis for judicial review that departs from the old common-law premises.<sup>18</sup> For instance, the section recognises 'justification' as a new ground for review which is broader than irrationality; and that it also provides for the ground of 'reasons in writing' which is a new ground unavailable at common law. Chirwa has therefore correctly expressed the view that section 43 of the Constitution is the new organizing framework for judicial review in Malawi and that common-law administrative law principles are subservient and are now only of secondary importance; as an aid to the interpretation of section 43.<sup>19</sup> We submit that Chirwa's approach is the right approach on the place occupied by the right to administrative justice under section 43 of the Constitution in the broader spectrum of administrative law in Malawi.

### **(b) *The enduring role of the (English) common law***

It is pertinent to note that section 200 of the Constitution provides for the continued application of the common law in the post-1994 constitutional dispensation.<sup>20</sup> However, students of Malawian administrative law must be mindful that section 43 of the Constitution has brought a paradigm shift in Malawian administrative law especially with regard to the grounds for judicial review. Whilst a number of recent decisions still seem to be rooted in the old common-law grounds as famously stated in *Council of Civil Service Union v Minister for the Civil Service*<sup>21</sup> namely illegality, irrationality and procedural impropriety, it appears that a trend is slowly emerging of decisions taking a more expansive approach to section 43. For

<sup>17</sup> Chirwa, *supra* note 10, 106.

<sup>18</sup> *Ibid*, at 107.

<sup>19</sup> *Ibid*, at 108.

<sup>20</sup> Section 200 of the Constitution.

<sup>21</sup> [1984]3 All E R at page 949.

instance, in the case of *State v Council of the University of Malawi, Ex-Parte University of Malawi Workers' Trade Union (Merits)*,<sup>22</sup> the High Court observed that:

in order to determine whether the decision taken is justifiable in relation to reasons given, the Court must necessarily examine the merits of the decision. The Court held that Section 43 of the Constitution cannot and ought not to be left out in any complete discourse on judicial review of administrative action in Malawi.

In *Chakuma & 16 Others v The Judicial Service Commission and the Chief Justice*<sup>23</sup> the High Court also took an expansive approach to judicial review, noting that the basis for judicial review is grounded in the Constitution and not merely in common-law principles such as *ultra vires*. She affirmed the view that 'courts have an obligation to ensure that administrators and others who hold public power not only act within powers granted to them but also function in accordance with the laws enacted by the legislature as well as with the ethos, values, principles and edicts espoused by the Constitution.'

What emerges from these decisions is a clear departure by the courts from settled common-law positions as they embrace constitutional innovations in the area of administrative law, brought about principally by section 43 of the Constitution.

It should also be borne in mind that the High Court (Civil Procedure) Rules, 2017 provide for judicial review, under Order 19 Rule 20. This rule makes provision for judicial review on grounds which include lawfulness; procedural fairness; justification of the reasons provided, if any; or bad faith, if any.

It is evident however that whilst Order 19 Rule 20 of the CPR, 2017 seeks to capture the essence of section 43 of the Constitution, it still limits the scope of judicial review to the conduct of public officials exercising public functions. A broad approach to constitutional interpretation however, as discussed earlier, facilitates our understanding of the scope of judicial review under the Constitution beyond such conduct by public officials.

### ***(c) Judicial deference: the appropriate role of the judiciary in relation to the executive under the separation of powers***

Judicial deference in administrative law is a principle that requires courts to be restrained in interfering with matters that are pre-eminently within the domain and competence of other branches of Government. The notion of constitutional deference was eruditely explained by the Constitutional Court of South Africa in *Minister of Health v Treatment Action Campaign (TAC case)*,<sup>24</sup> where the Court stated that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and

<sup>22</sup> Miscellaneous Civil Cause No. 1 of 2015 (HC)(ZA).

<sup>23</sup> Judicial Review Cause No. 22 of 2018 (HC)(ZA), para. 2.11.

<sup>24</sup> 2002 (5) SA 703, para. 98.

not the others, and that all arms of government should be sensitive to and respect this separation.<sup>25</sup>

It has been argued elsewhere that since the judiciary is the final arbiter on the constitutionality of laws or conduct in a system of constitutional supremacy, and also considering that courts make the final determination on the scope of their own powers, it is necessary that 'the courts must have mechanisms of self-restraint to prevent them from unnecessarily interfering with the functions of the other branches of government.' Redson Kapindu argues that courts need to be fully cognizant of the need to allow an appropriate margin of discretion for the other state organs.<sup>26</sup> He however also warns against the dangers of the judiciary becoming over-deferential and, in the process, sacrificing the protection of human rights at the altar of judicial deference. Commenting on a stream of administrative law decisions resting with *Mazibuko v City of Johannesburg*,<sup>27</sup> Kapindu argues that the approach taken by the South African Constitutional Court in *Mazibuko* was so deferential to the legislature and the executive as to signify a retreat from its constitutional obligation in promoting the neglected socio-economic rights of the voiceless, powerless and marginalised members of the South African society.<sup>28</sup>

In Malawi, the issue of judicial deference has come out in a number of notable decisions. One such decision is *Ministry of Finance ex parte SGS Malawi Limited (SGS case)*<sup>29</sup> where Mwaungulu J stated that matters involving social and economic policy (and generally matters involving competing policy considerations) are clearly non-justiciable in judicial review proceedings and that courts should defer to the executive and parliament. A similar expression of caution was sounded in *State v Chief Secretary to the President and Cabinet, Ex-Parte Bakili Muluzi (Ex-parte Muluzi)*.<sup>30</sup>

The issue of deference was also raised in *Gable Masangano & Others v Attorney General & Another (Masangano case)*.<sup>31</sup> The Court however adopted a less deferential approach stating that: 'On the argument that social-economic rights are non-justiciable we would like to suggest that modern legal and judicial thinking has significantly diminished the importance of such an assertion.' *Masangano* thus represents the appropriate caution that courts need to take in order to avoid the dangers posed by an over-deferential approach to executive administrative decisions on the protection of fundamental human rights.

Courts sometimes are deferential towards the other branches of government principally on pragmatic premises. Jamie Grace states that legal academics sometimes describe the refusal by the courts of a remedy, even when a claimant has

<sup>25</sup> Ibid.

<sup>26</sup> Redson E. Kapindu, 'Reclaiming the frontier of constitutional deference: Mazibuko v City of Johannesburg—a jurisprudential setback', (2010) 25 *Southern Africa Public Law* 471–472.

<sup>27</sup> 2010 (4) SA 1 (CC).

<sup>28</sup> Kapindu, *supra*, note 26, at 474.

<sup>29</sup> Miscellaneous Civil Application No. 40 of 2003 (HC)(PR).

<sup>30</sup> Miscellaneous Civil Application No.3 of 2011 (HC, MR, unreported).

<sup>31</sup> Constitutional Case No. 15 of 2007 (HC, PR).

established that the action or decision of a public body has been unlawful, as an issue of 'judicial deference', or 'comity'.<sup>32</sup>

The issue of judicial deference in administrative law cases has also come to be highlighted in cases where Malawian courts have recently started drawing a distinction between 'administrative action' and 'executive action'.<sup>33</sup> In *State v DPP, Ex-Parte Trapence and Mtambo*,<sup>34</sup> a panel of the High Court of Malawi sitting on a constitutional case held that the Director of Public Prosecutions (DPP) exercises executive functions or powers and not administrative powers. The court stated that such executive powers, being derived from the Constitution, are amenable to judicial review only in 'rare and extreme circumstances'. In the instant case, the court did not find rare and extreme circumstances to warrant judicial review.

In *Chaponda & Another v Kajoloweka & Others*,<sup>35</sup> the High Court had made an order suspending a Cabinet Minister from discharging his functions pending the conclusion of the work of the Commission Inquiry into the procurement of maize by a state agency from Zambia which was linked to the Minister. On appeal, the Supreme Court held that presidential powers derived from prerogatives which do not have any statutory or constitutional underpinnings or limitations are not amenable to judicial review; but that other prerogative powers are reviewable. The Court held that the presidential powers to appoint Ministers and Commissions of Inquiry do not fit into the category of powers that are subject to judicial review.

What these cases demonstrate is that when it comes to the exercise of executive powers, courts are expected to be more deferential as compared to instances where administrative action is in issue. Such judicial deference is a testament to the fact that courts give due regard to the concept of separation of powers even when exercising judicial functions such as in cases of judicial review. The judiciary, as the ultimate arbiter of the constitution and all laws applicable in Malawi, has the role of giving clear guidance on the demarcations of power provinces between the executive, the legislature, the judiciary and independent oversight institutions.

#### **(d) Exploring progress in developing novel remedies**

Administrative law has seen some new developments in the area of remedies in recent times in a number of jurisdictions. One of the innovative remedies fashioned in South Africa is that of meaningful engagement which can be traced to a series of judgments of the Constitutional Court<sup>36</sup> but was first adopted as the definitive remedial measure in *Occupiers of 51 Olivia Road, Berea Township and 187 Main Street Johannesburg v City of Johannesburg*.<sup>37</sup> In the *Olivia Road* case, at issue was the eviction of illegal squatters from certain abandoned buildings in the Johannesburg

<sup>32</sup> Jamie Grace, *Constitutional & Administrative Law: Key Facts Key Cases* (2016) 216.

<sup>33</sup> See Kapindu J's remarks in *State v Director of Public Prosecutions, Ex-parte Gift Trapence and Timothy Pagonachi Mtambo*, Miscellaneous Civil Cause No 16 of 2016 (High Court, Zomba) (unreported).

<sup>34</sup> Constitutional Cause No. 1 of 2017 (unreported).

<sup>35</sup> MSCA Civil Appeal No. 5 of 2017 (unreported).

<sup>36</sup> See for instance *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

<sup>37</sup> 2008(3) SA 208 (CC).

inner city. The Constitutional Court, instead of making the usual declaratory and other coercive orders, opted instead to order the parties ‘to engage with each other meaningfully’ in an effort to resolve the differences and difficulties aired in the application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights as well as the duties of the persons concerned. The Court clarified that ‘engagement is a two-way process in which the [parties] would talk to each other meaningfully in order to achieve certain objectives,’ and that ‘engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process.’<sup>38</sup>

Malawian Courts have started to adopt a similar approach. In *Inkosana Kangawa Mhone & Others v Malawi Housing Corporation*,<sup>39</sup> a case involving a decision to conduct mass evictions, the Judge held that this was an appropriate case where the Respondent (the Malawi Housing Corporation) and the Applicants had to seriously and meaningfully engage with a view to arriving at a mutually agreed lasting solution to the problem.<sup>40</sup>

Another interesting area in terms of administrative law remedies is that of the award of compensation for unlawful administrative decisions. Traditionally, Malawian courts have not been keen on awarding compensation as a remedy in administrative law review cases. It is worth it to note however that section 46(3) of the Constitution makes it clear that compensation is one of the remedies the Constitution prescribes for violation of constitutional rights, which include the right to administrative justice under section 43. However, in what seems to be a lone decision thus far, *Vincent Vundo Msiska v Malawi Dairy Industry*,<sup>41</sup> the Court grappled with the issue of constitutional damages for wrongful administrative action under the 1994 Constitution. The Court noted that there was not much, if any, local case authority on awards for breach of constitutional rights to fair administrative and labour practices. However, in the circumstances of the case, the Court proceeded to award the plaintiff K10,000.00 for violation of his constitutional right to fair administrative and labour practices.

It seems however, regrettably, that the approach in *Vincent Vundo Msiska v Malawi Dairy Industry* has not gained much traction in Malawian courts in disputes premised on administrative and constitutional law.

The position is in fact not unique to Malawi. James Read has stated that the absence of a general common-law right to damages for unlawful administrative action is one of the most striking areas of common deficiency in the legal systems

<sup>38</sup> See also Shanelle Van Der Berg, ‘Meaningful Engagement: Proceduralising Socio-Economic Rights Further or Infusing Administrative Law with Substance’ (2013) 29(2) *South African Journal of Human Rights* 376.

<sup>39</sup> Miscellaneous Civil Cause No 76 of 2014 (MZ) (unreported).

<sup>40</sup> A similar approach was adopted in *State v Malawi Housing Corporation, Ex-Parte: Malawi Housing Corporation Tenants Association Limited*, Judicial Review Cause No. 32 of 2017 (ZA) (unreported).

<sup>41</sup> Civil Cause Number 1034 of 1995 (HC, PR) (unreported).

of the modern Commonwealth, and further that it has surprisingly received little attention in public discussion.<sup>42</sup>

**(e) *The role of indigenous law in administrative law***

The role of indigenous (customary) law in administrative justice in Malawi is a fairly under-explored area. It can safely be stated that whilst customary (indigenous) law forms a major plank of law fully recognized under the Malawian Constitution,<sup>43</sup> the same has not been given appropriate recognition by the courts in fashioning the affairs of the State.<sup>44</sup> There remains a sense that received principles of law are given more weight than indigenously generated ones. There is evidence however that courts are slowly beginning to explore this area. In *State v Traditional Authority Kampingo Sibande, Ex-Parte Michael Phiri*,<sup>45</sup> the High Court observed that customary law governs people's day to day lives in many parts of Malawi. The court then stated that just like the common law, customary law may be sub-divided into 'public (customary) law', in cases where decisions of the Chief or his or her subordinate leaders, purely in the exercise of statutory or customary law powers are challenged; and 'private (customary) law' which regulates horizontal disputes between persons under the authority and jurisdiction of the Chief (commonly called 'subjects') in their private capacities. The Court concluded that such horizontal disputes would also include a dispute between the Chief himself or herself, in his or her private capacity, and any of his or her 'subjects'.

Interestingly, the Court also stated that in the event that the distinction between public and private customary law that the court drew in that case had not been previously recognised, the Court would be content to apply the provisions of Section 10(2) of the Constitution of Malawi and develop the customary law in that regard.

It is yet to be seen how other courts will embrace or perhaps eschew the proposed split of customary law into public and private in the context of administrative law as set out by the Judge in *Ex Parte Michael Phiri*.

As a general parting point here, it is important that Malawian institutions, including the courts, should embrace a national project of 'developing an autochthonous or indigenous legal system sensitive to the needs and mores of the society.'<sup>46</sup>

### 3. A CULTURE OF ACCOUNTABILITY

The underlying principles of the Constitution of Malawi have a predominantly liberal democratic orientation.<sup>47</sup> These include governmental accountability and also the guarantee of socio-economic rights, the right to administrative justice,

<sup>42</sup>James S Read, 'Damages in Administrative Law' (1988) 14(1) *Commonwealth Law Bulletin* 428–429.

<sup>43</sup>See sections 10(2), 26 and 200 of the Constitution.

<sup>44</sup>See Jack Oliver-Hood, 'Our Significantly Indigenous Administrative Law: The Treaty of Waitangi and Judicial Review' (2013) 19 *Auckland University Law Review* 53–54.

<sup>45</sup>Miscellaneous Civil Cause No. 15 of 2014 (unreported).

<sup>46</sup>*Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604, per Andrew Phang, JA para. 27.

<sup>47</sup>Section 12 of the Constitution.

and the right to effective remedies among others. One significant issue that the underlying principles raise is how the constitutional and general conception of administrative justice in Malawi interfaces with the principles. In this part, the paper argues that administrative law is central in ensuring the accountability of public officials in a constitutional democracy.

**(a) *The role of administrative justice in facilitating participatory democracy***

Administrative justice significantly contributes to the development of participatory democracy.<sup>48</sup> During the past two decades, Malawi's administrative law framework has significantly developed, in the process enhancing participatory democracy. During this period, each of the three branches of government has instituted some administrative justice mechanisms and processes which have promoted participatory democracy.

The executive has ensured the expansion of opportunities for public participation in administrative rule making, rule application and adjudication through the promulgation and enforcement of regulations, rules and guidelines using various and specific delegated legislative powers. The legislature has also played its part in facilitating the contribution of administrative justice to participatory democracy by enacting legislation which expands opportunities for people to participate in rule-making processes in a wide range of areas, including local government, environmental management, land allocation, settlement of land disputes and physical planning. On its part, the judiciary has facilitated the contribution of administrative justice to participatory democracy through its exercise of judicial review powers to promote participation in different contexts. For example, the courts have exercised judicial review powers to protect the right of police and military personnel<sup>49</sup> as well as prisoners to participate in elections; the making of local government by-laws;<sup>50</sup> and participation by family members in the process of determining succession to traditional leadership.

However, the contribution of administrative justice to participatory democracy in Malawi has been limited by a number of institutional and contextual factors such as widespread lack of public knowledge or awareness of administrative justice institutions, inaccessibility of the institutions, a culture of deference to authority,<sup>51</sup>

<sup>48</sup> John H. Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (1978)37 *Modern Law Review* 451.

<sup>49</sup> *Nkhwazi v Referendum Commission* Civil Cause No.96 of 1993.

<sup>50</sup> *State v Blantyre City Council, ex parte Chikwiri and 6 others* [2016] MWHC 560. The Applicants were in the business of hosting wedding ceremonies and similar functions at various residential areas within the City of Blantyre. Following a ban imposed by the city council on the hosting such activities in residential areas within the city, the High Court held the respondent's action to be in breach of administrative justice principles and lifted the ban.

<sup>51</sup> Booth observes that deference to authority and officialdom is widespread among people in Malawi and has deep roots in social norms. See David Booth et. Al., *Drivers of Change and Development in Malawi*, 2005. Further, in a 2008 Afrobarometer study, over 50% of respondents in the 2008 Afrobarometer survey strongly agreed with the statement that 'people are like children; the government should take care of them like a parent.' Afrobarometer, *Malawi Round 4 Survey*, 2008.

capacity constraints in public administration institutions and the judiciary, and an inadequate regulatory framework.

Enhancing the scale and quality of the contribution of administrative justice to participatory democracy requires a number of interventions, including raising public awareness and knowledge of administrative norms and processes. The challenge with this intervention is that its effects can be felt only in the medium to long term. In any case, raising public awareness and knowledge does not necessarily translate into willingness and ability of people to claim and enforce rights.

The inability and unwillingness of people to claim their rights despite decades of rights education programmes underscores the trite observation that awareness and knowledge do not directly translate into behaviour change. However, such awareness and knowledge are a necessary first step towards enhancing the prospects of citizen participation in administrative processes and to utilise administrative justice tools to secure broader democratic participation.

Another intervention with significant potential to facilitate the contribution of administrative justice to participatory democracy is the adoption of a mechanism for tracking the extent to which the public's contributions have a real influence on administrative decision-making processes. This intervention will address one of the most significant causes of low public participation in governance and service delivery in Malawi, namely, the widespread public perception that public participation in governance and service delivery is cosmetic and does not have any real influence on final decisions and actions.

Enhancing participation in administrative processes also requires interventions on the supply side of the governance regime, including the incorporation of administrative justice norms into regulations and rules than is presently the case. Currently, most statutes and subsidiary legislation which govern public administration enacted prior to the adoption of the current Constitution in 1994 make little provision for participatory democracy in administrative rule-making, rule-application and adjudication. Since 1994, Parliament has not undertaken any comprehensive review of legislation to ensure that it reflects constitutional standards of administrative justice. As a result, the statutory landscape comprises legislation with varying standards of administrative justice which contributes to inconsistencies in administrative practices and unequal access to justice. This challenge could be addressed in part by enacting framework legislation on administrative justice setting out common administrative law standards across the whole public service.

Capacity-related factors on the supply side of administrative justice limit its contribution to democratic participation, including the shortage of administrators with sufficient knowledge of principles of administrative law and justice. In the civil service, for example, very few officials below the rank of district commissioner or chief executive officer have had any formal instruction in administrative law.<sup>52</sup>

---

<sup>52</sup> IRDC, *Administrative Law and Governance in East Africa*. A Research report, available at <https://idl-bnc-idrc.dspacedirect.org/handle/10625/56967>, Accessed on 17 October 2019.



The second factor hampering the capacity of the majority of public administrators to perform their administrative justice obligations is inadequate, ineffective and inefficient communication and record-keeping facilities which are required for facilitating effective public participation in administrative processes.<sup>53</sup> Although significant improvements have been made in some areas, especially with initiatives such as digitisation of administrative data, there is continued reliance on poorly-managed records which are generated and maintained in manual form.

The potential for administrative justice mechanisms and processes to contribute to public participation is constrained further by political factors, including the central government's tendency towards centralisation of power. The starkest manifestation of this tendency was the decision by the President not to call for local government elections in 1995 as required by the Constitution. It was not until 2000 that the elections were called. Between 1995 and 2000, therefore, the country did not have a local government system.<sup>54</sup> Consequently, various structures through which the public could have participated in local government rule-making, rule-application and adjudication were non-existent. In this case, therefore, democratic participation was undermined by the absence of political will to establish administrative structures through which the public could enjoy such participation.

After the 2000 local government elections, government once again shirked its responsibility to call local government elections until 2014. Even after local government authorities were elected and once again became operational in 2014, the capacity of the structures to facilitate democratic participation was severely limited by the failure of the central government to fully devolve political and administrative power as well as financial resources as envisaged by the national decentralisation policy. The reasons for that failure are both technical and political, including the reluctance of political and administrative actors at the centre losing access to, and control of, public resources<sup>55</sup> and the manipulation and capture of local government by the centre which prevents effective democratic participation.<sup>56</sup>

Political factors also undermine the potential of administrative justice to contribute to democratic participation through the application of political pressure on administrative decision-makers in particular circumstances. Such political interference has, on a number of occasions, led to administrators' abuse and abdication of their statutory discretion for the financial and or political benefit of politicians and

<sup>53</sup> Mpho Ngoepe and Salmon Makhubela, 'Justice Delayed is Justice Denied: Records Management and the Travesty of Justice in South Africa' (2015) 25(3) *Records Management Journal* 288–305.

<sup>54</sup> See Richard Tambulasi, 'Local government without governance: A New Institutional Perspective of Local Governance Policy Paralysis in Malawi' (2011) 26(3) *Public Policy and Administration* 333–352.

<sup>55</sup> See Mustafa K Hussein, 'Decentralisation and Development: The Malawian Experience' (2004) 29(2) *Africa Development*. Also see Asiyati Lorraine Chiweza, 'The Political Economy of Fiscal Decentralisation: Implications on Local Governance and Public Service Delivery' in Dan Banik & B Chinsinga (eds.), *The Democratic Dividend: Political Transition and Inclusive Development in Malawi* (2016) 111–127.

<sup>56</sup> See Lovese Aalen & Ragnhild Muriaas (eds.) *Manipulating Political Decentralisation: Africa's Inclusive Autocrats* (2018).

their financial partners. High profile examples of such instances include the case in which administrators appeared to abdicate their statutory power to facilitate public participation in a proposed multi-million dollar water supply project by conducting environmental and social impact assessments.<sup>57</sup> The Malawi Law Society challenged the implementation of the big water supply project on the grounds that there could be no implementation without prior environmental impact assessment involving public participation, as required under section 24 of the Environment Management Act. The High Court granted the Law Society interim relief but the decision was later overturned on appeal on technical grounds.<sup>58</sup>

In another example, the case of *Mhango & Others v Council of the University of Malawi*,<sup>59</sup> a minister directed the administrators of a public university to adopt a particular students' admissions policy, contrary to statutory requirements for participation in such decisions by members of the university's senate. In that case, the applicants who were university students, had been admitted to the University of Malawi on a non-residential basis. They challenged the university's decision to admit them on non-residential basis. They also assailed the university's criteria of selecting students to the university by considering their districts of origin and not solely on grounds of merit. The applicants argued that the selection criteria was discriminatory and applied for judicial review asking the court to declare the decision of the council of the university ultra vires. They contended that the council of the university unlawfully fettered its own powers under the University Act when it adopted a directive of the government of Malawi to change the admission criteria from merit as the sole criterion and to include district of origin. They also argued that the university had failed to comply with its statutory obligation to consult the university senate on matters of academic policy. The court found that the university had indeed unlawfully fettered its powers under the University of Malawi Act by simply adopting a government directive. The Court also found that the university was at fault by implementing an academic policy without consulting the Senate as it was required under the Act. Further, the court held that university's decision to found its admission criteria on the basis of district quota and not solely on merit was unfairly discriminatory. However, the Court ended up dismissing the judicial review claim on the ground that it had been brought late, having been brought to court three years after the impugned decision was taken.

**(b) *The role of administrative justice in facilitating the realisation of socio-economic rights***

Administrative justice institutions and processes have also contributed to the protection and enforcement of education, labour, housing, water, and economic

<sup>57</sup> See *S v Lilongwe Water Board & Others; Ex Parte: Malawi Law Society* (Judicial Review Cause No.16 of 2017) [2017] MWHC 135 (21 April 2017).

<sup>58</sup> *Lilongwe Water Board & Others v Malawi Law Society*, MSCA Civil Appeal No. 59 of 2017 (unreported).

<sup>59</sup> [1993] 16(2) MLR 605.

activity rights. Instances of such contribution include statutory enactment and judicial pronouncement of standards of procedural fairness in relation to the administration of the delivery of water, education and healthcare services and the facilitation of economic activity.

Over the past two decades, for example, Parliament has enacted a number of legislative provisions which have imposed express obligations on administrative bodies involved in rule-making, rule application and adjudication directly related to socio-economic rights to afford persons affected by their decisions the right to be heard. In the past decade, the obligations have been expressly imposed on some institutions with critical roles in democratic governance and delivery of socio-economic services, including the Registrar of Financial Institutions,<sup>60</sup> the Water Resources Authority,<sup>61</sup> the National Council for Higher Education<sup>62</sup> and the Teachers Council of Malawi, among others.<sup>63</sup>

Socio-economic rights have also been promoted through the expansion of public participation in administrative rule-making by duty-bearers involved in the delivery of socio-economic rights. In some cases, this has taken the form of providing for public, civil society and stakeholder representation in decision-making bodies, including the National Disaster Preparedness and Relief Committee whose membership is required by statute to include at least three representatives of the non-governmental sector;<sup>64</sup> the governing board of the Water Resources Authority whose membership is required to include representatives of each of the following: catchment management committees, associations of water users, non-governmental organizations engaged in the water sector and key private sector stakeholders;<sup>65</sup> the Fisheries Advisory Board whose members are required to include nominees of small scale commercial fishermen, large scale commercial fishermen, fish traders and the general public;<sup>66</sup> the Tripartite Labour Advisory Council which consists of, among others, and nominees of trade unions and employers' organisations.<sup>67</sup>

The judiciary has also contributed to the protection and enforcement of some socio-economic rights through the application of administrative justice norms, especially by way of reviewing administrative action. The broader contribution of judicial review to administrative justice is discussed in more detail elsewhere in this paper. In the past two decades, some progressive administrative justice norms pertaining to socio-economic rights have been developed by the courts. In *Gable Masangano v Attorney General and others* the claim was for violation of the rights of detained persons to proper ventilation, food, clothing and other amenities as

<sup>60</sup> Section 27(4) of the Financial Services Act (2011).

<sup>61</sup> The Authority has the overall mandate to regulate the use of water resources in Malawi.

<sup>62</sup> Cap 30:12 of the Laws of Malawi.

<sup>63</sup> Under s 57 of the Education Act, Cap 30:01 of the Laws of Malawi.

<sup>64</sup> Section 6, Disaster Preparedness and Relief Act, Cap 33:05 of the Laws of Malawi.

<sup>65</sup> Section 8(3)(a), the Water Resources Act, Cap 72:03 of the Laws of Malawi.

<sup>66</sup> Fisheries Conservation and Management Act (1998), s 5(1)(d)–(g).

<sup>67</sup> Labour Relations Act, Cap 54:01 of the Laws of Malawi, s 55(1)(b)–(c).

guaranteed by the Constitution.<sup>68</sup> In *S v Lilongwe Water Board and Others; Ex Parte: Malawi Law Society* the High Court, among other things, ordered the government to grant the Malawi Law Society access to information on aspects of the administration of a major water supply project.<sup>69</sup> Critical issues in the case related to the conduct of an environmental and social impact assessment (ESIA).

On the whole, it seems the overall contribution of administrative justice institutions and processes to the protection and enforcement of socio-economic rights remains significantly limited by the absence of express constitutional or statutory guarantees of socio-economic rights such as food, water and housing. In the absence of such guarantees, administrative decision-makers and the courts lack the normative basis on which they can develop compliance with human rights standards as a specific obligation of administrators and a specific ground for judicial review.<sup>70</sup>

The contribution of administrative justice institutions and processes to the realisation of socio-economic rights is also constrained by limited access to administrative justice institutions by the vast majority of people whose socio-economic rights are violated. The same forms of deprivation that make certain sections of the population vulnerable to abuses and violation of their human rights impede them from overcoming financial barriers that obstruct their access to administrative justice institutions. In addition, civil society representation of marginalised and excluded communities and individuals in defence of their socio-economic rights is significantly more limited.

The role of civil society organisations in facilitating the realisation of human rights through administrative processes requires more than enhancing the institutional capacity of civil society organisations. Although the level of organisation of citizen groups is critical,<sup>71</sup> equally important are the existence of epistemic communities, networks, and interest groups<sup>72</sup> and the dynamics of the sectoral interests of particular stakeholder groups.<sup>73</sup>

Although the right to administrative justice is guaranteed by the Constitution, its potential to contribute to the enhancement of participatory democracy and the enjoyment of socio-economic rights is currently constrained by a number of factors. Such factors include the low levels of citizen awareness of, and demand for,

<sup>68</sup> *Gable Masangano v Attorney General & others* [2009] MLR 171. The Court held, amongst other things, that matters involving such rights are justiciable.

<sup>69</sup> [2017] MWHC 135 (21 April 2017), Judicial Review Cause No.16 of 2017.

<sup>70</sup> On the advantage of using human rights as a *sui generis* ground (not a species of the ground of illegality). See Mark Tushnet, 'New forms of judicial review and the persistence of rights-and democracy-based worries' (2003) 38 *Wake Forest Law Review* 813–838.

<sup>71</sup> Donald Hornstein, 'Complexity Theory, Adaptation, and Administrative Law' (2005) 54(4) *Duke Law Journal* 913–960 and 929.

<sup>72</sup> Martin Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2000) *Indiana Journal of Global Legal Studies* 369 and 325.

<sup>73</sup> Maureen Berner, Justin Amos and Ricardo Morse, 'What Constitutes Effective Citizen Participation in Local Government? Views from City Stakeholders' (2011) 35(1) *Public Administration Quarterly* 128–163.

their constitutional rights to lawful, fair, transparent and accountable treatment by administrative agencies; financial and other barriers which impede access to justice institutions; gaps, contradictions and ambiguities in the law that governs local government administrative agencies;<sup>74</sup> excessive deference to authority; and procedural and other constraints on parliamentary and judicial oversight powers over administrative processes and decisions.

Despite years of delivery of a range of interventions aimed at addressing the constraints listed above, including civic and rights education programmes and capacity building of public administration and judicial institutions and processes, the majority of people in the country remain unable to claim and enforce their rights to administrative justice. This highlights the limitation of relying on the enforcement of rights as the primary approach to promoting administrative justice in Malawi. A more effective and efficient alternative approach in the Malawian context may be to focus on the obligations of decision-makers to deliver administrative justice.

#### 4. ALTERNATIVES TO JUDICIAL REVIEW

##### *(a) Are recommendations made by ombudsman-type bodies binding?*

There are a number of alternatives to judicial review as a means of remedying breaches of administrative law, including through statutory appeal and review tribunals and constitutional bodies such as the Human Rights Commission and the Ombudsman. Tribunals are discussed in the next section while this section focuses on the Human Rights Commission and the Ombudsman. These two institutions are required and empowered to assist any person or group of persons, whether natural or legal, in ensuring the promotion, protection and enforcement of the rights contained in the Constitution and redress any grievances in respect of those rights.<sup>75</sup> The discussion focuses on the binding nature of recommendations and directives that the Human Rights Commission and Ombudsman make in the exercise of their respective constitutional mandates.

The Constitution empowers the Ombudsman to investigate allegations of injustice where no judicial remedy is available or where there is no other practicable remedy. Under section 126 of the Constitution, the Ombudsman can 'direct' that appropriate administrative action be taken. Further under the Ombudsman Act, the Ombudsman can take any appropriate action or steps to remedy a situation. In 2017, the Ombudsman registered 219 complaints, 139 of which related to injustices arising from employment relations, while 56 focused on service delivery.<sup>76</sup> Where the Ombudsman determines that injustice was occasioned, he or she is empowered to grant various remedies including setting aside the impugned decision.<sup>77</sup>

<sup>74</sup> Diana Cammack, Edge Kanyongolo and Tam O'Neil, 'Town Chiefs in Malawi' (2009) *Africa Power and Politics Working Paper No. 3*.

<sup>75</sup> Section 15(2) of the Constitution.

<sup>76</sup> See <http://www.ombudsmanmalawi.org/files/pdf/1524125989.pdf> Accessed 17 October 2019.

<sup>77</sup> Section 8(1) of the Ombudsman Act (Cap 3:07).

In addition to making recommendations relating to specific complaints that are filed by members of the public, the Ombudsman has also made recommendations based on investigations undertaken on the office's own initiative. In the past few years, such investigations have covered mental health care administration, the protection of children living rough on the streets by district and city councils, and the administration of a compensation fund for victims of historical human rights abuses.

Since the office became operational in 1998, the question whether the recommendations or directions made by the Ombudsman are binding has been the subject of academic debate and litigation with a variety of differing judicial opinions.<sup>78</sup> However, the clearest response to this question was given by the Supreme Court of Appeal in the 2019 decision of *State v The Ombudsman ex parte Principal Secretary for Finance and 2 others*.<sup>79</sup> The Ombudsman had received a complaint regarding the manner in which the executive and the legislature disposed of tractors, which had been procured for distribution to rural farmers. Upon investigation, the Ombudsman made several remedial directives. Dissatisfied with the Ombudsman's findings, recommendations and directives, the respondents applied to the High Court for their judicial review. The court agreed with the respondents and held that the Ombudsman's determinations and recommendations were not binding as she lacked jurisdiction. On appeal, the Supreme Court of Appeal held that 'the respondents [were] obliged to comply with the Ombudsman's directed remedies.' The ultimate effect of this decision is that remedial orders by the Ombudsman have binding authority and should be recognised by the judiciary.

In relation to the Human Rights Commission, there has been less judicial clarity on whether its recommendations are binding. The differences between the Ombudsman and the Human Rights Commission may partly be explained by their different mandates. While the constitutional mandate of the Ombudsman empowers the office to 'direct and order', that of the Human Rights Commission is only to 'recommend' measures. Recommendations do not create a mandatory obligation.<sup>80</sup> Further, the Human Rights Commission Act provides that once the Commission makes recommendations to the competent authority, such authority must 'consider the recommendation[s] and take such action as it deems fit.'<sup>81</sup> Further, construing section 130 of the Constitution provides that the Commission 'shall not exercise a judicial or legislative function', the MSCA, in the case of *Trustees of*

<sup>78</sup> See the differing opinions in *Ombudsman v Malawi Broadcasting Corporation*, MSCA Civil Appeal Number 23 of 1999 on the one hand; and *Air Malawi v Ombudsman*, MSCA Civil Appeal no. 1 of 2000, and *Malawi Broadcasting Corporation v The Ombudsman*, MSCA Civil Appeal No 47 of 2000 on the other.

<sup>79</sup> MSCA Civil Appeal No. 24 of 2017 (decided on 11th February 2019).

<sup>80</sup> In *S v President and Another ex parte Chihana and 3 others* (Misc. Civil Cause No. 86 of 2015) [2015] MWHC 439, the High Court held that recommendations generally are not binding and, therefore, the decision of the President to appoint one person as Clerk of Parliament despite the Parliamentary Service Commission's recommendation of another was upheld by the court.

<sup>81</sup> Section 22(e) and (f).

*Malawi against Physical Disabilities v The State and the Ombudsman*,<sup>82</sup> held that the Commission can only recommend and not make binding decisions on anyone. It therefore follows that recommendations made by the Commission have no binding force.

The lack of an explicit constitutional or statutory provision, or judicial precedent that provides that the directives or recommendations of the Ombudsman are binding does not prevent the creative use of other means of securing the same result. Even prior to the decision in the case of *State v The Ombudsman ex parte Principal Secretary for Finance and 2 others* in which the court held that the recommendations of the Ombudsman are binding, the Ombudsman had been able to rely on a combination of constitutional provisions to make its recommendations *de facto* binding. Following a failure of an institution or official to comply with any of the Ombudsman's recommendations, the office of the Ombudsman reports the non-compliance to the Legal Affairs Committee of Parliament which typically inquires into the matter and, if so minded, orders the errant institution to comply with the Ombudsman's recommendation. Since orders of parliamentary committees are binding, the recommendations of the Ombudsman now become binding as in effect Parliament takes them over as its own. Using this parliamentary route, the Ombudsman has secured compliance even from public institutions, including those which in the past routinely ignored any recommendation or directive by the Ombudsman based on the view that they were not binding.

It is open to the Human Rights Commission to adopt the approach taken by the Ombudsman by using the opportunities presented by statutory provisions, such as section 37 of the Human Rights Commission Act, under which the Commission reports to Parliament, by reporting the institutions which had not complied with its recommendations. Parliament could then adopt the recommendations, summon the responsible actors and issue a directive that the recommendations be complied with. Failure to obey such directive (and, by extension, the recommendations) would constitute contempt of Parliament, an offence whose maximum punishment is a fine of £200 and imprisonment for two years.<sup>83</sup> This approach would enhance deterrence against non-compliance with recommendations made by the Commission while, at the same time, obliging non-compliant administrators to give reasons for their failure to comply with the recommendations.

### **(b) Mechanisms to encourage full public participation**

In Malawi, public participation in governance is generally very low. A 2019 study on democratic accountability indicates low levels of participation in governance processes illustrated by the following findings: only 23% of the population reported having ever attended a district council meeting, 18% had attended a community rights committee meeting while 9.4% reported that they had attended a meeting

<sup>82</sup> [2000–2001] MLR 391.

<sup>83</sup> Section 19 of the National Assembly (Powers and Privileges) Act (Cap. 2:04).

to discuss public service delivery.<sup>84</sup> Respondents attributed their low levels of participation to limited access to information, lack of knowledge of the opportunities and mechanisms for participation and limited accessibility to decision-makers and decision-making processes.

In any case, the availability of opportunities to participate in rule making, rule application and adjudication does not necessarily translate into effective participation which influences the resulting decisions and actions.<sup>85</sup> There is a widespread perception across the country that public participation has little influence on final decisions and actions taken by public officials and institutions. In the 2018 democratic governance and justice survey, this perception was cited by many respondents as a significant reason why some people do not participate in community governance and service delivery activities and processes.

Encouraging full public participation, therefore, requires not only expanding opportunities for public participation through such interventions as raising public awareness and knowledge of available opportunities and mechanisms for participation, especially at community level. It also requires improving the effectiveness of such participation through measures such as enhancing the public's access to information and tracking of decisions and activities for inclusion of inputs from the public participation.

### ***(c) Administrative appeals and review tribunals***

Malawi does not have an overarching administrative appeal or review tribunal. Instead, tribunals are established by different statutes and mandated to exercise their powers in specific areas. These include Land Tribunals, the National Service Tribunal, the Patents Tribunal, the Trademarks Tribunal, the Registered Designs Tribunal, the Liquor Licensing Appeals Tribunal, the Rent Tribunal, the Environmental Tribunal, the Aviation Tribunal, the Child Case Review Board, the Education Appeals Tribunal and the Financial Services Appeals Committee.

A number of 'informal' tribunals also play a significant role in public administration and their contribution to administrative justice must not be ignored. Established variously under customary, religious and other normative regimes, such tribunals form part of the country's informal justice system which is considered to be more accessible, less costly and more attuned to community standards and conceptions of justice. Some of the most widely used 'informal' tribunals are chiefs' tribunals, whose functions include resolving administrative justice questions regarding succession to chieftaincy and village and farm boundaries. Religious tribunals are equally important in the lives of people in Malawi, the majority of whom are affiliated to religious formations. These tribunals play critical roles in rulemaking, rule application and adjudication which affect the right to administrative justice of such a large part of the population. The work of such tribunals is

---

<sup>84</sup> Malawi Government, *Justice and Democratic Accountability Survey*, 2018.

<sup>85</sup> *Ibid.*



so important that it must be acknowledged and critically assessed in any consideration of the institutional framework of administrative justice in Malawi. The effectiveness of administrative tribunals may be assessed both subjectively and objectively. The former focuses on the individual tribunal's attainment of its own set objectives, while the latter assesses effectiveness with reference to broader justice delivery criteria. There is, however, no national framework for the qualitative and quantitative evaluation of the performance of tribunals. This makes it difficult to reach any definite conclusion on the effectiveness of individual tribunals.

The challenge of measuring the effectiveness of tribunals may be addressed by developing and implementing a common framework of standards based on administrative justice norms applicable to all tribunals; establishing a uniform format for keeping records of all cases handled by all tribunals; setting up a digital system for centrally archiving all records of the cases and conducting regular assessments on the effectiveness and efficiency of case-handling by the tribunals.

The country's financial constraints suggest that new administrative tribunals should not be established unless there is an exceptional need for them. Indeed, there is need for structural reform which must focus on rationalising, systematising and judicialising tribunals without which 'administrative justice remains a cluttered and fragmented affair.'<sup>86</sup>

In the absence of comprehensive and systematic collection and keeping of records on the operation of all tribunals, the amount of resources invested in them is difficult to establish. However, given the widespread resource shortages in public service and justice sector institutions, it seems unlikely that adequate resources would be invested in tribunals.

The diversity of tribunals and absence of common procedural standards that govern them is reflected in variations in the processes for appointing their members. Despite their differences, however, the processes share some common characteristics. For example, members of almost all statutory tribunals are appointed and removable from office by a cabinet minister. The other feature shared across statutory tribunals is the vagueness of the grounds on which members of tribunals may be removed from office. In most cases, the minister is empowered to remove a member of a tribunal. The power of the minister over the appointment and removal of tribunal members limits their autonomy. This is compounded by the vagueness of the grounds for removal whose effect is to grant very wide discretion to ministers and undermine the security of tenure of members of tribunals. Subjecting the powers of appointment and removal to direct oversight and control by the Public Appointments Committee of parliament is likely to enhance public confidence in the impartiality of the tribunals and their structural and operational independence.

---

<sup>86</sup> Stephen Thomson, 'Clutter and Cobwebs: How administrative tribunals in Hong Kong can learn from the UK' (2017) 36(3) *Civil Justice Quarterly* 363–386.

The processes for appointment and removal of members of traditional and religious tribunals are as varied as there are communities and religious groups, and are internal matters in which courts are typically reluctant to intervene. Nevertheless, since the constitutional standards of administrative justice are applicable to both legal and natural persons, appointment and removal from membership of traditional and religious tribunals must, as a minimum, comply with the requirements of procedural justice.<sup>87</sup>

**(d) What measures should be taken to enhance access to information?**

Access to public information and to administrative justice are mutually interdependent. On the one hand, access to information enhances the quality of public participation in administrative processes and improves the capacity of citizens to effectively claim their administrative justice rights. On the other hand, administrative justice mechanisms and processes, such as judicial review, may be used to enforce the right of access to information. In both respects, access to public information in Malawi is limited by, among other things, the lack of an operational comprehensive legislative framework and various social, economic and cultural characteristics of contemporary Malawian society.

Since the adoption of the 1994 Constitution, the enactment of the Access to Information Act in 2017 was the most significant step towards guaranteeing everyone in Malawi access to information. However, to date, the Act is yet to become operational. The limitation of access to information created by the non-operationalisation of the Act is mitigated by a number of other pieces of legislation which provide for access to information in certain specific contexts or for particular groups of people. These include the HIV and AIDS (Prevention and Management) Act (2018) which entitles every person ‘the right to access information in connection with HIV and AIDS held by the State or any organ of the State, where the information is necessary for the exercise of his rights;’ the Disability Act (2012) which guarantees every person with a disability the ‘right to access information and communication technologies at an affordable cost’<sup>88</sup> and the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act (2013) and the Pensions Act (2011) which obliges trustees of pension funds to provide members with fund information.<sup>89</sup>

On its part, the High Court has in the past enforced the right of access to information based on the constitutional guarantee of the rights without reference to the Access to Information Act. A case in point is that of *Attorney General v Chakuamba*<sup>90</sup> in which the Supreme Court of Appeal, relying on the section of the Constitution which guarantees the right, held that a candidate in the 1999 presidential elections was entitled to have access to information, documents and other materials relating

<sup>87</sup> Section 43 of the Constitution.

<sup>88</sup> Section 25.

<sup>89</sup> Section 60.

<sup>90</sup> [2000] MWSC 5 (22 October 2000).

to the 1999 general elections held by the country's elections management body.<sup>91</sup> This case was decided before the Access to Information Act was even enacted, and demonstrates that the absence of an operational enabling statute cannot deter a court from utilising administrative law tools to secure human rights. This view is reinforced by the ruling in the case of *S v Lilongwe Water Board and Others; Ex Parte: Malawi Law Society* in which the High Court ordered the Lilongwe Water Board and the ministry of agriculture, irrigation and water development to publicly disclose documents on a multi-million dollar project to supply water to the capital city.<sup>92</sup>

Despite specific statutory provisions and judicial pronouncements which promote the right of access to information, however, the potential contribution of the right to administrative justice, participatory democracy and human rights, is significantly constrained by user-based factors which include low levels of formal education resulting in the limited ability of many individuals to know and understand available sources and possible content of public information held by the state or any of its organs; low levels of public awareness of the right to information; low levels of English language literacy; a culture of deference to authority;<sup>93</sup> and inadequate financial resources with which to facilitate access to information. Access is also hindered by a variety of interface-based factors, including limited public access to information communication technology;<sup>94</sup> and a centralised bureaucracy with a historical culture of secrecy resulting from its entrenchment 'in authoritarian ways.'<sup>95</sup> Some social systemic features of Malawian society also impede access to information. Key among these are social, physical and political marginalisation from the sites where information is stored and a culture of orality and informality which militates against the generation, archiving and retrieval of records.

Enhancing administrative justice requires addressing the obstacles to access to justice outlined above. Realistically, it might be prudent to prioritise measures that do not require prohibitive amounts of resources and those that can yield immediate results. This suggests that the following steps can be taken in the immediate to medium term: the operationalisation of the Access to Information Act; translation of key public documents, such as records of local government meetings and budgets into local languages; provision of community-based/owned information communication technology facilities and their use for the dissemination of public information; and decentralisation of information-holding points. These interventions must be complemented by advocacy for interventions which address the user-based and social/systemic obstacles.

<sup>91</sup> [1999] MLR 17.

<sup>92</sup> *Supra* note 69.

<sup>93</sup> Deference to authority and officialdom is widespread in Malawi and has deep roots in social norms (Booth, *supra*, note 6). Over 50% of respondents in the 2008 Afrobarometer survey strongly agreed with the statement that 'people are like children; the government should take care of them like a parent.' Afrobarometer, *supra*, note 5.

<sup>94</sup> For instance, as at 2014, only 7% of the households in Malawi had access to internet. See NSO, *Survey on Access and Usage of ICT services in Malawi*, 2014.

<sup>95</sup> Evidence of bureaucratic reluctance to grant access to public information was found by the Malawi Economic Justice Network (MEJN) in a study that the organization conducted in 2007.

**(e) Separate administrative court?**

Malawi has a four-tier judiciary, with the lowest level being composed of local courts. The next level is subordinate courts followed by the High Court, while the highest court is the Supreme Court of Appeal. Local courts are presided over by lay persons or chiefs and their jurisdiction is limited to civil cases at customary law and minor common-law and statutory offences. Subordinate courts consist of magistrate courts, child justice courts and the industrial relations court.

Almost all judicial activity pertaining to administrative law revolves around the High Court as it is the only court which the Constitution empowers to undertake judicial review; to interpret the constitution, including the bill of rights, one of whose provisions guarantees the right to administrative justice; and to hear appeals in electoral disputes; among others. In addition, the High Court serves as an appellate court in cases originating from subordinate courts as well as exercising its own 'unlimited original jurisdiction. With a complement of only 27 High Court judges, it is apparent that judges in that court have heavy workloads. This negatively affects the efficiency of the court and affords judges little time for the deliberation and contemplation necessary for the development of an analytical judicial philosophy on any legal subject, including administrative law. The establishment of a court exclusively handling administrative law and justice matters would greatly help in advancing administrative law and justice in Malawi.

**(f) Training**

Whilst no minimum educational qualification for appointment is prescribed for lay magistrates, professional magistrates must have a minimum of a Bachelor of Laws degree. Typically, the curriculum of study for that degree includes a significant content of administrative law. Upon their appointment, therefore, all professional (resident) magistrates, judges of the High Court and justices of the Supreme Court of Appeal have a sound knowledge of fundamental principles and rules of administrative law. In addition, various *ad hoc* training programmes, which include content on administrative law and justice, are available to judicial officers.

In contrast, the educational qualifications of lay magistrates are varied and post-appointment training opportunities for them are significantly limited. Any training programmes offered to these officers are relatively short-term and can only cover basic elements of the law. Training of magistrates is conducted at a national training institute where trainees learn mostly in lectures delivered by judges and other legal professionals.

**5. CONCLUSION**

Administrative law is a branch of public law that plays a very important role in ensuring that public duty-bearers are held to account in the exercise of their powers and functions. Administrative law is therefore an essential feature of a functioning democracy.

Administrative law principles in Malawi are deeply rooted in the English common law. However, such principles have been fundamentally supplemented, and in some ways reshaped by the provisions of section 43 of the Constitution. In addition, the broader values and underlying principles of the Constitution advocate for participatory democracy which includes participation in administrative rule-making and rule-application as well as decision-making. This participatory scheme sharply contrasts with the scheme under the 1966 Constitution which was deeply centralised with the space and scope for judicial review severely constrained.

This chapter demonstrates how strides in these areas have been made since the adoption of the 1994 constitution. More recently, Malawi has witnessed a number of developments in the area of administrative law. Among the most notable ones are the recent clarification by the Supreme Court of Appeal in *State v Ombudsman ex parte Principal Secretary for Finance and 2 others* that decisions of the Ombudsman are legally binding; and the decision of the High Court in *State v DPP, Ex-Parte Trapence and Mtambo* that courts must exercise a wide measure of deference towards the executive when it comes to the exercise of executive action as contrasted with administrative action. In addition, recent jurisprudence by the courts has highlighted the difference between public customary law and private customary law, establishing that public customary law is directly amenable to judicial review processes whilst private customary law issues are resolved using private customary law norms.

Finally, this chapter shows that Parliament, through its various committees, provides a very potent lever of accountability as against the executive and that these are a good alternative to judicial remedies against public maladministration.

# An Overview of the Framework Governing Administrative Justice in Kenya

CECIL ABUNGU\*

## ABSTRACT

This chapter describes Kenya's administrative law framework in the context of the changes introduced by the Constitution of Kenya of 2010. The chapter discusses the principles underpinning administrative law and the institutions that have been established to deliver and or facilitate access to

administrative justice in Kenya. In addition, the chapter evaluates the performance of some of the institutions created to deliver justice and makes recommendations on how administrative law can be leveraged to pursue good governance in Kenya.

## 1. INTRODUCTION

Administrative law is a branch of public law which regulates the various organs of government administration and prescribes in detail the manner of their activity, being concerned with such topics as the collection of the revenue, the public safety and morals, sanitation amongst many others.<sup>1</sup> This branch of the law therefore, regulates public bodies and officials so as to safeguard the interest of the public.<sup>2</sup> It primarily deals with the organisation and power of administrative and quasi-administrative bodies with emphasis on the manner of exercise of their assigned powers.<sup>3</sup> Thus, it provides an avenue for redress for victims of arbitrary exercise of these powers.<sup>4</sup>

This body of law has its origins in the English common law and the principles embodied correctly matched the needs of England.<sup>5</sup> With the advent of colonisation, these rules of administrative law were imposed upon colonial Africa- Kenya being a part of it, through the general reception status, despite the wide differences between the prevailing circumstances in England and colonial Africa.<sup>6</sup> This produced an unsuitable administrative framework in pre-independence Kenya. The situation worsened after independence. In the pre-independence period and for a

---

\* Cecil Abungu is an LLM candidate at Harvard Law School. He gives special thanks to Professor Migai Akech for the consistent guidance throughout and Mdathir Timamy for research assistance.

<sup>1</sup> Bryan Garner (ed) *Black's Law Dictionary* 2 ed (1999).

<sup>2</sup> M. Akech. *Administrative Law* (2016) 12.

<sup>3</sup> I. Kilonzo. *Administrative law in Kenya* (2011) 1.

<sup>4</sup> *Ibid.*

<sup>5</sup> R Seidman, 'Administrative Law and legitimacy in Anglophonic Africa: a problem in the reception of foreign law' (1970) 5(2) *Journal of the Law and Society Association* 167.

<sup>6</sup> *Ibid.*

long time thereafter, administrative law was a recognised source of law by virtue of section 3 of the Judicature Act, which recognised the Common law as a source of law.<sup>7</sup> However, the mechanisms put in place to ensure a just outcome in the administrative decisions were inadequate.<sup>8</sup>

This was certainly the norm during this period which can be evidenced by the following observations; as reported by Sessional Paper No. 3 of 2009 on National Land Policy, a lot of land in Kenya was compulsorily acquired without following the due process.<sup>9</sup> In addition, the award of tenders was not based on a fair process but rather they were awarded to those who were politically influential.<sup>10</sup> Examples of these corruption scandals include the Goldenberg and the Anglo-leasing scandal which greatly affected the nation's economy.<sup>11</sup> Also, the public officials hardly served the public interest and anyone who opposed government at the time would face dire consequences including torture or even being jailed.<sup>12</sup> These indeed, are only a few of the many examples of ways in which the public bodies were flawed in their administrative decisions. The 2010 Constitution of Kenya was drafted strategically with the intention to address all these existing loopholes. However, before analysing the legal framework which guarantees administrative justice in Kenya, there is a need to briefly identify the key principles which underpin the administrative law framework in Kenya.

## 2. THE CARDINAL PRINCIPLES UNDERGIRDING ADMINISTRATIVE LAW IN KENYA

In order for administrative law to effectively operate there is a need to promote separation of powers, independence of the judiciary and the rule of law.<sup>13</sup> This will help in promoting fair conduct within the public bodies and hence administrative justice.<sup>14</sup> Separation of powers was first proposed by Montesquieu, whose concern was to avoid the over concentration of powers in a single organ of government.<sup>15</sup>

This arrangement would guarantee that no organ had unchecked powers as each organ would have the mandate to check on others.<sup>16</sup> Therefore, under the separation of powers decisions made by the administrative bodies who formed part of the executive could be questioned by the legislature (as part of its oversight role)

<sup>7</sup>Judicature Act (1967), s 3.

<sup>8</sup>This is because during this period, the judiciary was not independent and was even considered to be a part of the executive. For example, during the Moi regime the President enjoyed absolute powers which adversely affected the justice system.

<sup>9</sup>Sessional paper No.3 of 2009 on National Land Policy, 46.

<sup>10</sup>M Segita, 'The Future of Administrative Law in Kenya' (2017) 4(2) *Kabarak Journal of Research and Innovation* 85.

<sup>11</sup>Ibid.

<sup>12</sup>Ibid.

<sup>13</sup>Akech op cit 2 at 12.

<sup>14</sup>Ibid.

<sup>15</sup>Ibid at 13.

<sup>16</sup>Ibid.

and by the judiciary using its powers of judicial review.<sup>17</sup> While Montesquieu's idea of absolute separation of powers may be criticised as impractical (as co-operation between the various organs of government is inevitable), his idea on checks and balances has been useful, and has been implemented in the various constitutions in the world including that of Kenya.<sup>18</sup>

Closely related is the principle of an independent judiciary. This principle postulates that there should be a distinct organ of government whose function is to administer justice and that this organ must operate impartially and must be independent of direction, control and undue influence.<sup>19</sup> It must as much as possible be disinterested in the proceedings and must administer justice on the basis of facts and law without fear or without external influence.<sup>20</sup> In administrative law, judicial independence is crucial because one of the main pathways of accessing administrative justice is by taking administrative conduct on judicial review. Such review must be done by an independent and impartial court that is capable of enforcing the law without fear or favour. The 2010 Constitution of Kenya guarantees judicial independence in article 160 (1), which states that the judiciary is subject to the Constitution only and shall not be directed by any person or authority.<sup>21</sup>

Finally, for the effective operation of administrative law the rule of law must be guaranteed. This principle demands that the exercise of governmental powers must be based on the established laws and principles and not on the personal whims of those in power. In addition, as explained by Dicey this principle suggests that all persons are equal before the law and no one is above it. The rule of law is essential as it compels the administrative bodies to make decisions according to the law rather than arbitrarily. The rule of law is guaranteed in the 2010 Constitution as one of the constitutional values.<sup>22</sup> The Constitution further obliges the President,<sup>23</sup> the Attorney General,<sup>24</sup> and political parties to respect the rule of law.<sup>25</sup>

### 3. CONSTITUTIONALISATION OF ADMINISTRATIVE LAW

Under the previous constitutional dispensation, the application of administrative principles was based on the English common law. However, with the promulgation of the 2010 Constitution, administrative law was constitutionalised by virtue of article 47, which guarantees the right to fair administrative action that is lawful, reasonable, expeditious and procedurally fair.<sup>26</sup> The purpose of enshrining this

<sup>17</sup> *Ibid* at 14.

<sup>18</sup> Examples of checks and balances in the constitution- national assembly questioning Cabinet Secretaries, Supreme Court's powers with regards to the state of emergency declared by the President, and impeachment.

<sup>19</sup> Akech *op cit* 2 at 14.

<sup>20</sup> *Ibid*.

<sup>21</sup> Constitution of Kenya (2010), article 160.

<sup>22</sup> *Ibid*, article 10.

<sup>23</sup> *Ibid*, article 131 (2).

<sup>24</sup> *Ibid*, article 156 (4) and (6).

<sup>25</sup> *Ibid*, article 91.

<sup>26</sup> *Ibid*, article 47.



article in the Constitution, was to tackle the problems in the public service.<sup>27</sup> These problems include corruption—a major problem—but also incompetence, unfairness and general lack of a caring approach.<sup>28</sup> This provision would thus tackle the problem at its root and thus reduce pressure on the courts or other institutions to deal with complaints. It would also lead to better decision-making by the administration.<sup>29</sup>

The recognition of administrative justice as a constitutional right has revolutionised the application of administrative law in Kenya. Judicial review is no longer grounded in the common law but rather it is now based on the Constitution.<sup>30</sup> Instead of being an inherent power of the courts, judicial review is now a constitutional function of the courts. This improvement prevents ousting and interference with access to administrative justice.<sup>31</sup> In addition, it has further equipped the citizens with an avenue to question administrative decisions and seek redress in the courts without fear as it is a guaranteed right.<sup>32</sup>

In addition to the above, the constitutionalisation of the right to administrative justice has occasioned judicial review on grounds that are wider than those provided for at common law.<sup>33</sup> Subsequently, in terms of Article 23 of the Constitution, the remedies that the courts can grant in a judicial review matter have also been widened far beyond the common-law remedies of *mandamus*, *certiorari* and *prohibition* to include conservatory orders, declarations, injunctions, and compensation.<sup>34</sup> The constitutionalisation of the right to administrative justice is also supposed to result in the establishment of a comprehensive legislative and institutional framework to provide for administrative justice.<sup>35</sup>

The courts have not shied away from recognising the constitutionalisation of administrative law and its implications for judicial review. In the case of *Republic v Speaker of the Senate and another Ex parte Afrison Export Import Limited and another*, Justice Mativo firmly pronounced that the court has the power to consider the work of the Senate and any other organ of government including the executive. He further stated that judicial review should be thought of as a constitutional supervision of public authorities.<sup>36</sup> He recognised that the time had come for the courts

<sup>27</sup> Constitution of Kenya Review Commission, *Final report of the Constitution of Kenya Review Commission*, (2005) 119.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at 119.

<sup>30</sup> J Gichuhi. *Constitutionalisation of Administrative Justice in Kenya* (2011) 2 available at [https://www.academia.edu/7052956/John\\_Gichuhi\\_Constitutionalisation\\_of\\_Administrative\\_Justice\\_in\\_Kenya\\_2014](https://www.academia.edu/7052956/John_Gichuhi_Constitutionalisation_of_Administrative_Justice_in_Kenya_2014), accessed on 18 October 2019.

<sup>31</sup> *Ibid.*

<sup>32</sup> Unlike common law review, constitutional review extends to procedural propriety and substantive reasonableness of the administrative action.

<sup>33</sup> Gichuhi *op cit* 31 at 3.

<sup>34</sup> Constitution of Kenya (2010), article 23.

<sup>35</sup> Gichuhi *op cit* 31 at 4.

<sup>36</sup> *Republic v Speaker of the Senate and another Ex parte Afrison Export Import Limited and another* (2018) eKLR.

to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of the exercise of power.<sup>37</sup>

While the Constitution has only expressly provided for fair administrative action as per Article 47(1) and (2), there are other provisions in the Constitution which refer to the same concept. This is seen in other articles such as: Article 47(3), which gives parliament authority to legislate on fair administrative actions;<sup>38</sup> Article 59, which establishes the Kenya National Human Rights and Equality Commission and gives Parliament room to restructure the Commission;<sup>39</sup> Article 79, which gives parliament power to establish an Ethics and Anti-Corruption Commission;<sup>40</sup> and the establishment of the Independent Police Oversight Authority (IPOA) as per Article 244 of the Constitution; the office of the Controller of Budget, Auditor General, Director of Public Prosecution as per Article 228,<sup>41</sup> 229 and 157 respectively. Finally, Parliament has oversight authority on the administrative bodies based on their powers. All these institutions work hand in hand to ensure administrative justice in Kenya. The next section analyses the avenues put in place to guarantee access to administrative justice.

#### 4. ADMINISTRATIVE JUSTICE: AVENUES FOR REDRESS

##### (a) *Judicial review*

This is an avenue whereby a party affected by an administrative decision can take the matter to court. As highlighted in the preceding section, this is now guaranteed in the Constitution. In addition, Parliament enacted the Fair Administrative Actions Act (FAA Act), which further safeguards this right.<sup>42</sup> As per the Constitution and the FAA Act, any administrative decision will be amenable to judicial review if the decision is unlawful, unreasonable, unjustified, procedurally unfair, not proportional, or the public was not involved in the making of a decision in which the law required its involvement.<sup>43</sup>

Lawfulness addresses the fact that the administrative body making the decision should have the legal mandate to do so.<sup>44</sup> Moreover, even where they have the power they ought to comply with the procedures required when exercising the power.<sup>45</sup> Courts will intervene to guarantee administrative justice if this principle is violated. Judicial review on the ground of reasonableness may be invoked where the decision maker failed to consider relevant matters or where the decision maker considered irrelevant matters or the decision itself defies logic.<sup>46</sup> In addition, article

<sup>37</sup> Ibid.

<sup>38</sup> Constitution of Kenya (2010), article 47(3).

<sup>39</sup> Ibid, article 59.

<sup>40</sup> Ibid, article 79.

<sup>41</sup> Ibid, articles 228, 229 and 157.

<sup>42</sup> Fair Administrative Actions Act 4 of 2015 (FAA Act).

<sup>43</sup> Ibid, s 5.

<sup>44</sup> Akech op cit 2 at 30.

<sup>45</sup> Ibid.

<sup>46</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948), Court of Appeal.

47(2) and section 5 of the FAA Act provide that a person whose right or fundamental freedom has been or is likely to be affected by administrative action has the right to be given written reasons for the action. The public should also participate in the making of administrative decisions that affect them.<sup>47</sup> The FAA Act establishes procedures for public participation.<sup>48</sup>

Further, in the interest of administrative justice the Constitution also guarantees procedural fairness.<sup>49</sup> This principle is closely associated with the principle of natural justice which embodies two main ideas, namely that persons who would be affected by an administrative decision should have an opportunity to be heard before the decision is taken, and the decision-maker should be free from any biases.<sup>50</sup> These two principles protect the people against arbitrary administrative conduct, guarantee the right to be heard, the right to be given a prior notice of the allegations, the disclosure of all the information the body has against the party involved, the party's right to adjourn the proceedings whenever they need more time to prepare, the party's right to examine the tribunals' witnesses, the body ought to give the affected party with written reasons for their decisions, the right to have a legal representation during the proceedings and finally the right to appeal the administrative decisions.<sup>51</sup> All these are rights guaranteed by the FAA Act.<sup>52</sup>

To guarantee administrative justice, the Constitution has also widened the scope of legal standing as per Article 22. It allows not only the affected person to seek redress in court but also a person acting in the public interest, or for a class of people or even for an association.<sup>53</sup> This has certainly enabled more people to file judicial review cases which have strengthened justice in this field. In addition, judicial review is not only applicable to public bodies but extends to private bodies exercising public functions, private bodies whose actions affect peoples' livelihoods or rights protected in the Bill of Rights as was the case in *Rose Mambo v Limuru Country Club*.<sup>54</sup> Finally as noted in the preceding section, the Constitution has now widened the scope of remedies that can be awarded in a judicial review matter.<sup>55</sup> These rights have also been protected in the FAA Act. All these developments have gone a long way in enhancing administrative justice in Kenya.

## **(b) Redress through independent commissions and offices**

### **(i) Commission of Administrative Justice**

Article 59 of the Constitution establishes the Kenya National Human Rights and Equality Commission. Further, it empowers Parliament to restructure this

<sup>47</sup> FAA Act op cit 43, s 5.

<sup>48</sup> Ibid.

<sup>49</sup> Akech op cit 2 at 67.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> FAA Act op cit 43, s 4.

<sup>53</sup> Constitution of Kenya (2010), article 22.

<sup>54</sup> *Rose Mambo and 2 others v Limuru Country Club and 17 others* (2014) eKLR.

<sup>55</sup> Constitution of Kenya (2010), article 23.

Commission by enacting legislation that distributes its functions to various commissions. Since the promulgation of the Constitution in 2010, Parliament has accordingly established three commissions namely, the Kenya National Human Rights Commission, the Gender and Equality Commission and finally the Commission of Administrative Justice.<sup>56</sup> The Kenya National Human Rights Commission focusses on ensuring that human rights in Kenya are not violated as per the treaties and conventions to which Kenya is a party.<sup>57</sup> The National Gender and Equality Commission seeks to meet the goals regarding the gender equality implementation.<sup>58</sup> Lastly, the Commission of Administrative Justice (CAJ) works to ensure administrative justice.<sup>59</sup>

Of interest to this chapter is the CAJ which is also referred to as the Ombudsman Office. Ombudsman is a Scandinavian word that means an officer or commissioner with the duty to investigate and report to Parliament on citizens' complaints against administrative action.<sup>60</sup> He/she is not a court of appeal and cannot alter or reverse government action.<sup>61</sup> His/her powers reside in his capacity to focus public and parliamentary attention upon the grievances of citizens.<sup>62</sup>

Despite the fact that the Ombudsman was introduced in Kenya in 2007, the question of creating this office had been variously discussed earlier.<sup>63</sup> It was recommended by the Commission of Inquiry (Public Service Structure and Remuneration Commission 1970–71).<sup>64</sup> In addition it was also proposed in a sessional paper in 1974.<sup>65</sup> Moreover, the establishment of this office was debated in Parliament in 1985 and 1995.<sup>66</sup> Despite all these efforts, government opposed its creation on account of a misunderstanding about the work of an ombudsman and it argued that creating the office would lead to duplication within administrative rounds.<sup>67</sup> The net effect was that the administrative bodies were flawed with malpractices and injustices.

As stated earlier, this office was first established in 2007 through Gazette Notice number 5826 of 29th June 2007.<sup>68</sup> At this time, this office was known as a standing committee on public complaints.<sup>69</sup> It was established under Section 23 of the

<sup>56</sup> Akech op cit 2.

<sup>57</sup> Constitution of Kenya (2010), article 59.

<sup>58</sup> National Gender and Equality Commission Act 15 of 2011 (NGEC Act).

<sup>59</sup> Commission on Administrative Justice Act 23 of 2011 (CAJ Act).

<sup>60</sup> Kilonzo op cit 3 at 6.

<sup>61</sup> Akech op cit 2.

<sup>62</sup> Ibid.

<sup>63</sup> Kilonzo op cit 3 at 6.

<sup>64</sup> Report of the Commission of Inquiry, *Public service structure and Remuneration Commission*, May 1971, 23.

<sup>65</sup> Sessional Paper No. 5 of 1974, 36.

<sup>66</sup> Kilonzo op cit 3.

<sup>67</sup> The AG opposed a motion in 1995 to create the office saying that the proposed office had too much power beyond what is envisaged in other countries.

<sup>68</sup> Akech op cit 2.

<sup>69</sup> Ibid.

repealed Constitution that gave the President the full executive authority.<sup>70</sup> The establishment of the office of the ombudsman in 2007 followed long agitation since the committee members were to report to the President.<sup>71</sup> This was a big compromise in the working of the office and the resultant effect was that the office was unsuccessful in its operation.

Following the implementation of the 2010 Constitution, the CAJ was established through the Commission on Administrative Justice Act of 2011. The Commission is established as a successor to the public complaints standing committee. The Act gives the Commission powers to: conduct investigations on its own initiative or upon receiving a complaint, facilitate dispute resolution through reconciliation or mediation, and perform any other function assigned by legislation.<sup>72</sup> The function of the Commission can be summarised as undertaking the investigation of any conduct in state affairs both at the national government level and the county government level.

The Commission investigates complaints of malpractices and maladministration, within public administration, and thereafter they are to promote alternative dispute resolution of the complaints and recommend compensation or other appropriate remedies.<sup>73</sup> The Commission should then give proposals on how to improve public administration.<sup>74</sup> Finally they ought to report bi-annually to the National Assembly on complaints investigated and action taken thereon.<sup>75</sup>

In spite of these wide powers assigned to the Commission, their powers are also limited in the sense that the Commission cannot interfere in proceedings or a decision of the Cabinet or a committee of the Cabinet, a matter pending before any court or judicial tribunal, the grant of any honours by the President, anything in respect of which there is a right of appeal or any other legal remedy unless the appeal or legal remedy is not available to the complainant and lastly, any matter pending under investigation by anybody or Commission established by the Constitution or any other written law.<sup>76</sup>

Since its establishment, the Commission has managed to address a number of the administrative malpractices.<sup>77</sup> It has, for example, provided redress in cases which involved the failure by the Kenyan Prisons Service to award promotions according to the established guidelines, and the failure by the National Land Commission to follow due process when acquiring land.<sup>78</sup> In addition, they have given advisory opinions to the National Treasury pointing out that it issued the circular effecting budget cuts without Parliamentary approval. Accordingly, the

<sup>70</sup> Constitution of Kenya (1963), s 23.

<sup>71</sup> Kilonzo op cit 3 at 7.

<sup>72</sup> CAJ Act op cit 60, s 8.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid at s 30.

<sup>77</sup> Commission on Administrative Justice Annual Report, 2016/ 2017, 6.

<sup>78</sup> Ibid at 8.

Commission advised the National Treasury to withdraw the offending part of the Circular, disburse the total allocations, and seek parliamentary approval in instances where adjustments were necessary.<sup>79</sup> Another important milestone by the Commission is that it spearheaded the implementation of the right of access to information.<sup>80</sup> The Access to Information Act<sup>81</sup> gives the Commission the mandate to oversee its implementation.

However, the Commission has also faced a number of challenges such as in planning and accessing communication and advertising funds held by the Government Advertising Agency.<sup>82</sup> This negatively affects the ability of the Commission to increase public awareness of its functions. Another challenge is the lack of regulations necessary for the full operationalisation of the Access to Information Act.<sup>83</sup> Whereas the law gives oversight and enforcement functions to the Commission, it places the responsibility of spearheading the development of regulations to the Ministry of Information, Communication and Technology.<sup>84</sup> However, the Ministry is yet to kick-start the development of the regulations. As a result of the delay by the Ministry, the Commission is unable to fully implement the Act. Another major problem is with regards to the low budget ceiling.<sup>85</sup> The budgetary ceiling is not commensurate with the Commission's wide mandate which was further expanded following the enactment of the Access to Information Act in September 2016.<sup>86</sup> This has overstretched the Commission's human resource capacity and infrastructure, and inhibited decentralisation of ombudsman services.<sup>87</sup>

#### (ii) *The Ethics and Anti-Corruption Commission*

This is a Commission established pursuant to article 79 of the Constitution of Kenya—which gives Parliament the mandate to create it. Parliament enacted the Ethics and Anti-Corruption Commission Act, which created the Commission under section 3. The creation of this body was necessary following the many complaints submitted to the Constitution of Kenya Review Commission during the drafting process.<sup>88</sup> The complaints were in relation to the rampant corruption in government and its agencies, and the people wanted a mechanism by which public officers could be held accountable.<sup>89</sup> This formed the rationale for the establishment of this Commission.

<sup>79</sup> Ibid at 40.

<sup>80</sup> Ibid at 33.

<sup>81</sup> No. 31 of 2016, ss 20–24.

<sup>82</sup> Commission on Administrative Justice Annual Report op cit 78 at 57.

<sup>83</sup> Ibid at 58.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Constitution of Kenya Review Commission, Final report of the Constitution of Kenya review Commission, (2005) 64 (CKRC Final Report).

<sup>89</sup> Ibid.

In guaranteeing administrative justice, the Leadership and Integrity Act gives the Commission the mandate to investigate any complaints of a public officer who is in breach of the Code of Conduct (which they are to sign on appointment)<sup>90</sup> and to summon any individual (whether a suspect or not) to produce specified documents in their possession.<sup>91</sup> This Commission has enhanced administrative justice by providing an avenue for corruption complaints that would otherwise not be in the jurisdiction of the Ombudsman.

The functions of this commission may be summarised as: to investigate corruption, economic crimes and violation of codes of ethics particularly those named in the Anti-Corruption and Economic Crimes Act and the Leadership and Integrity Act;<sup>92</sup> to develop and oversee enforcement of the Codes of Conduct and Ethics; to file recovery proceedings including forfeiture of unexplained assets;<sup>93</sup> and to recover public property acquired through corruption.<sup>94</sup> Finally, the Commission conducts mediation, conciliation and negotiation amongst the affected parties if the circumstances allow.

However, this Commission lacks prosecutorial powers.<sup>95</sup> Instead, once it has conducted investigations and findings that there is an abuse of the office, it is required to request the Director of Public Prosecution (DPP) to prosecute.<sup>96</sup> The office of the DPP is established by the Constitution, which gives it mandate to institute criminal proceedings against any person before any court.<sup>97</sup> There have been a number of corruption scandals which have been investigated and proceedings instituted by the DPP among them those focusing on the actions of the Geothermal Development Company where the directors of the state owned parastatal were prosecuted, the National Youth Service (NYS and the National Hospital Insurance Fund (NHIF). Nonetheless, involving two bodies to resolve the issue has been problematic in the recent years since most prosecution proceedings instituted by the DPP end up being withdrawn.<sup>98</sup> Many have attributed this to the fact that the DPP, which is supposed to be an independent office, still falls under the executive arm which makes the office prone to interference by members of the executive.<sup>99</sup> On the other hand, the Ethics and Anti-Corruption Commission enjoys absolute independence making it better placed to conduct the prosecutions.

<sup>90</sup> Leadership and Integrity Act 19 of 2012, s 42.

<sup>91</sup> *Ibid*, s 28.

<sup>92</sup> *Ibid*, ss 39–45.

<sup>93</sup> Anti-Corruption and Economic Crimes Act 3 of 2003, ss 55–61.

<sup>94</sup> Ethics and Anti-Corruption Commission Act 22 of 2011, s 13.

<sup>95</sup> *Ibid*, s 11(*d*).

<sup>96</sup> *Ibid*.

<sup>97</sup> Constitution of Kenya (2010), article 157.

<sup>98</sup> P. Vidija, 'There's no evidence to prosecute corruption cases, DPP tells senate', *Star*, 13 June 2018 available at <https://www.the-star.co.ke/news/2018-06-13-theres-no-evidence-to-prosecute-corruption-cases-dpp-tells-senate>, accessed on 28 March, 2019.

<sup>99</sup> A Mungai 'Give us Powers to Prosecute, EACC Says', *Standard*, 8 December 2017 available at <https://www.standardmedia.co.ke/article/2001262454/give-us-powers-to-prosecute-eacc-says>, accessed on 28 March 2019.

*(iii) Independent Police Oversight Authority (IPOA)*

This is an independent authority whose primary mandate is to provide for civilian oversight over the police in order to prevent impunity and enhance professionalism by the police. Its constitutional mandate is based on Article 244 which requires the police to respect human rights, adhere to high levels of discipline and professionalism and accountability in the execution of their duties.<sup>100</sup> To further elaborate on its duty, Parliament established the Independent Police Oversight Authority Act.<sup>101</sup> The functions of the IPOA now include: receiving and investigating complaints of members of the service, monitoring and investigating policing operations affecting members of the public, and reviewing any patterns of police misconduct and taking all reasonable steps to facilitate access to the Authority's services.<sup>102</sup>

This Authority has managed to facilitate administrative justice by giving civilians an avenue to report the malpractices of the police officers. The Authority has been successful in conducting many of its investigations against the police making the police body more accountable. As of 2017, the IPOA had completed 674 investigations and had 292 active investigations with a further 53 cases in court at that time.<sup>103</sup> These statistics prove how efficient the IPOA has been since its inception. It is on the basis of this success, that Members of Parliament in the Justice and Legal Affairs Committee want to expand the Authority's powers beyond the police to include the Kenya Wildlife Service (KWS), Kenya Forestry Service (KFS) and Kenya Prison Service.<sup>104</sup>

*(iv) Office of the Auditor General and the Controller of Budget*

These are independent offices created by virtue of Articles 228 and 229 of the Constitution. These offices are crucial in enhancing administrative justice as they ensure that public funds are not misappropriated. The Office of the Controller of Budget has the function of authorising withdrawals and the power to deny these withdrawals.<sup>105</sup> This office guarantees administrative justice as each national entity (as per the Public Finance Management Act) is required to submit an annual cash plan and forecast to the Controller of Budget. Further, this office has the mandate to conduct investigations on its own motion when the Controller of budget suspects that there are malpractices in the public administration.

The Auditor General has the mandate to audit the accounts of both the national and the county governments.<sup>106</sup> His or her powers are further established in the Public Audit Act 2015, which gives the Auditor General the power to require any

<sup>100</sup> Constitution of Kenya (2010), article 244.

<sup>101</sup> Independent Police Oversight Authority Act 35 of 2011 (IPOA Act).

<sup>102</sup> *Ibid*, s 6.

<sup>103</sup> Independent Police Oversight Authority, 'The Policing Lens' (2017) 1.

<sup>104</sup> Independent Police Oversight Authority, 'Advocacy to Expand IPOA'S Oversight Mandate' (2018) 1.

<sup>105</sup> Constitution of Kenya (2010), article 228.

<sup>106</sup> *Ibid*, article 229.



public body to produce any document and to provide any official information.<sup>107</sup> Further, the Auditor General has unhindered access to internal audit reports of any state organ or public entity.<sup>108</sup> To protect these powers, the Act prohibits the Cabinet Secretary from making regulations that are inconsistent with it.<sup>109</sup>

From the above provisions of the Constitution and the relevant legislation, it is clear that measures have been established as checks and balances to the executive in a bid to achieve administrative justice.

(v) *Redress through commissions of inquiry*

These are Commissions formed by the President with the sole purpose of investigating a specific matter. The President appoints commissioners and authorises them to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.<sup>110</sup> The President specifies the matter to be inquired into, and directs where and when the inquiry is to be made and the report thereon produced.<sup>111</sup> Their mandate ceases as soon as they report back on the matter to the President.

There are several commissions of inquiry that have been put in place over time which include: the Kenya Maize Commission, the Commission on the Law of Marriage and Divorce, the Commission of Inquiry on the Law of Insurance (The Hancock Commission), Judicial Commission Appointed to Inquire into allegations involving Charles Mugane Njonjo, the Ouko Commission of Inquiry (1990–91), the Akiwumi Commission into Ethnic Violence, Judicial Commission of Inquiry into the Goldenberg Affair, the Commission on Higher Education (The Davy Koech Commission), Commission of Inquiry into the Land Law systems of Kenya, the Commission of Inquiry on Post-Election Violence (Waki Commission). In spite of the many Commissions established, only few have been successful in remedying the perceived problems. A good example of a successful outcome is the Commission on the Law of Succession 1968 which resulted in the enactment of the Law of Succession Act 1981.

However, the majority of the inquiry commissions have been a waste of resources as they have had little or no impact. For example, the Ouko Commission was disbanded in spite of not having solved the issue it was created to inquire into.<sup>112</sup> The report of the Hancock Commission on the law of insurance was also not published.<sup>113</sup> Worst of all, perhaps, was the Commission of Inquiry into the

<sup>107</sup> Public Audit Act 34 of 2015, s 21 (1).

<sup>108</sup> Ibid, s 33 (2).

<sup>109</sup> Ibid, s 68.

<sup>110</sup> Commissions of Inquiry Act (1963), s 3.

<sup>111</sup> Ibid.

<sup>112</sup> P Bowry, 'An inquiry into the Commissions of Inquiry', Standard, 13 January 2010 available at <https://www.standardmedia.co.ke/article/2000000823/an-inquiry-into-commissions-of-inquiry>, accessed on 29 March 2019.

<sup>113</sup> Ibid.

Goldenberg Affair, whose report was never implemented. These are a few examples proving the inefficiencies of the commissions of inquiry which have adversely affected administrative justice, despite having been created for the purpose of enhancing administrative justice.

To address this issue, there is a need to reform the Commission of Inquiry Act. For example, in jurisdictions like England and Australia, there is an opportunity for direct parliamentary involvement in the appointment of commissions of inquiry.<sup>114</sup> However, in Kenya, the appointment of commissions of inquiry is the sole preserve of the President.<sup>115</sup> This has been criticised and suggestions have been made that there should be direct parliamentary participation in the appointment of commissions of inquiry.

Another possible issue to be addressed is the duration of the commissions of inquiry. The Act gives the President the mandate to determine when a commission should submit its report.<sup>116</sup> This results in many of the commissions of inquiry being a waste as the findings are hardly reported and if they are, the reporting occurs when the issues are no longer relevant. For example, the Bosire Commission took about three years to be completed, a fact which was heavily criticised.<sup>117</sup> If some of the reforms proposed are implemented, the commissions of inquiry will be better placed to perform their function and thus strengthen administrative justice.

#### (vi) *Redress through parliamentary oversight*

Parliamentary oversight is a constitutionally mandated function of the legislature to scrutinise and oversee executive action. It entails formal and informal strategic and structured scrutiny exercised by the legislature in respect of the implementation of laws, the implementation of the budget and the strict observance of statutes and the Constitution.<sup>118</sup> This mandate is meant to enhance administrative justice as it may ensure that the rule of law is respected, policies formulated by government are effectively implemented, and it may promote government transparency and accountability.<sup>119</sup>

To oversee the administrative bodies in a bid to enhance justice, the legislature uses the following mechanisms. Parliament has the substantive motion powers which gives it the powers to initiate the removal of the Cabinet Secretaries on its own motion or following a petition from the public.<sup>120</sup> This is important as it gives any member of the public who has suffered administrative injustices from a Cabinet Secretary or any other senior official a chance to obtain justice. Closely

<sup>114</sup> African Centre for open Governance (AfriCOG), 'A Study of Commissions of Inquiry in Kenya', (2007) 4.

<sup>115</sup> Commissions of Inquiry Act, op cit, s 3.

<sup>116</sup> Ibid.

<sup>117</sup> AfriCOG op cit 115 at 10.

<sup>118</sup> H Yamamoto, 'Tools for Parliamentary Oversight: A comparative Study of 88 National Parliaments, Inter-Parliamentary Union, Geneva (2007) 9.

<sup>119</sup> Ibid.

<sup>120</sup> Constitution of Kenya (2010), article 152.

related to these powers, is the National Assembly's power to hold the relevant Cabinet Secretary accountable.<sup>121</sup> These powers enable the National Assembly to hold the Cabinet Secretary accountable for the performance of the various parastatals under his or her ministry. This avenue helps in ensuring that the administrative system is just.

Another mechanism Parliament uses to enhance administrative justice is through the parliamentary committees. The primary aim of these committees is to systematically sustain scrutiny of the executive and other arms of the government. These committees are established by Parliament's standing orders. For instance, section 205 establishes the Public Accounts Committee (PAC). The function of this Committee is to examine accounts showing the appropriations of public finance by the ministries, departments and agencies of government.<sup>122</sup> This Committee works closely with the Auditor General. The Public Investment Committee is also established by section 206 of the Standing Orders.<sup>123</sup> The main functions of the Committee are to examine reports and accounts of public investment and examine whether public investments are being managed in accordance with sound financial principles and prudent commercial practices.<sup>124</sup> This Committee mostly provides oversight over semi-autonomous government agencies. These committees ensure administrative justice by ensuring that public finances are appropriately used and the accountability of public officers responsible for the inappropriate use of public funds. Other committees include the Implementation Committee which ensures that all the strategies are implemented by the executive.

Despite the legislature having sufficient powers that would otherwise guarantee administrative justice, Parliament has in a number of cases failed to fully maximise its mandate to guarantee this. For example, in the Geothermal Development Company scandal, despite the Committee embarking on the investigations, two years down the line it had not reported on its findings.<sup>125</sup> This delays any form of action that could have been taken by the legislature and thus undermines administrative justice.<sup>126</sup> In addition, Parliament also lacks any form of sanctions against the administrators found guilty of administration malpractices.<sup>127</sup> This further weakens administrative justice.

To address these issues the standing orders ought to be reviewed by giving Parliament the power to sanction guilty administrators. In addition, the investigative powers of the relevant committees ought to be regulated by giving each committee a deadline by which they should report back to the house.

<sup>121</sup> *Ibid*, article 153.

<sup>122</sup> National Assembly, National Assembly Standing Orders, Tenth Parliament, January 9 2013 (National Assembly Standing Orders), 9 January 2013, s 105.

<sup>123</sup> *Ibid*, s 206.

<sup>124</sup> *Ibid*.

<sup>125</sup> J. Ngirachu, 'EACC Probes Sh10bn Geothermal Developmmt Company Deals' *Business Daily*, 23 February 2015, available at <https://www.businessdailyafrica.com/news/EACC-probes-Sh10bn-GDC-deals/539546-2632766-37j6knz/index.html>, accessed on 29 March 2018.

<sup>126</sup> Institute of social Accountability, 'Oversight Role of Parliament', (2012) 6.

<sup>127</sup> *Ibid*.

## 5. CONCLUSION

From the above analysis, it is clear that a number of drastic measures have been put in place to enhance administrative justice in Kenya. However, the administrative justice system still faces a number of challenges such as the commissions of inquiry failing to submit the required reports, or the failure to take action after they submit their reports. In addition, while parliamentary committees have adequate powers, these powers ought to be enhanced by giving the Parliament the power to sanction and set deadlines for action. Furthermore, the DPP has not been fully equipped to prosecute corruption scandals investigated by the EACC, owing to the interference by the executive. Thus, there is a need to give the EACC prosecution powers.

The establishment of the Ombudsman has gone a long way in improving the administrative justice system. However, the office's performance is constrained by underfunding. In order to address this challenge, there is a need to give this office financial independence as is the case with the judiciary. Finally, the judiciary ought to be more robust, especially when reviewing administrative conduct which adversely affects people's access to livelihoods.

# Resurgent Judicial Power and Administrative Law in Uganda

RONALD KAKUNGULU-MAYAMBALA\*

## ABSTRACT

Administrative law is a branch of law governing the exercise of power by administrative agencies of government. This chapter examines the development of administrative law by the courts in Uganda, from colonial times to independence and into the post-independence era. Whereas there was little development of this branch of law during the colonial era, since independence the Ugandan courts have altered the law in a number of interesting ways. While the common law appears to emphasise the distinction between public and private law,

this dichotomy has been blurred. Judges in Uganda have expanded the traditional boundaries of judicial review that strictly distinguished between the public-private spheres in seeking redress from decisions of private actors, and those of public bodies. Another interesting development has been the extension of administrative law into matters of a criminal nature. The chapter notes that these developments have been made to further the constitutional goal of protecting people against abuse of public power.

## 1. INTRODUCTION

Administrative law is a branch of law governing the activities of administrative agencies of government. Administrative law largely deals with regulating government action and is based on the core principles of constitutional law, such as separation of powers, the rule of law, the right to a fair hearing, protection of public servants and the principle of non-discrimination among others.

In Uganda, contemporary administrative law has its roots in the reception of English common law through the 1902 Order-in-Council, which formalised colonial rule in the Protectorate.<sup>1</sup> The Order-in-Council dealt with several matters of constitutional significance ranging from the provincial and administrative

---

\*The author is Associate Professor at the School of Law, Makerere University. He is most grateful to Dr Businye Kabumba for comments received on an earlier draft of this paper. He is also deeply indebted to Ms. Lornah Afoyomungu Olum for excellent research assistance rendered, and to the African Development Law Institute (ADLI) for institutional support in this regard.

<sup>1</sup> Article 15(2) of the Order in Council. The reception clause essentially defined the law to be applied in the protectorate and in particular in the judicial determination of disputed matters by court. The applicable law was to include doctrines of equity and statutes of general application of force. The Order-in-Council was in exercise of power granted to His Majesty's government under the Foreign Jurisdiction Act of 1890 to legislate with regards to foreign territories of the United Kingdom.

divisions, structures of government, administration of justice and the maintenance of law and order.

## 2. ADMINISTRATIVE LAW IN THE EARLY YEARS (1902–1955)

In the colonial period, governance at both local and central levels was concerned with entrenching and consolidating political power.<sup>2</sup> While governance was decentralised, as part of a larger project of indirect rule, in the main this served to advance the interests of the colonial project, rather than the needs and welfare of the people of the Protectorate.<sup>3</sup>

The existence of well organised structures in Buganda and a hereditary ruler that had authority made it easy to introduce indirect rule in Buganda, and then use Buganda as an agent to reach the other parts of the country, or the regions of the north, west and east without such centralised leadership.<sup>4</sup> For instance, the British monarchised Busoga and the Kyabazingaship along the Buganda model.<sup>5</sup> Buganda chiefs were also sent to other parts of the Protectorate, serving until the late 20s and 30s, when they were replaced with other local people from those regions.<sup>6</sup>

In 1920, another Order-in-Council (OIC) was promulgated, whose major significance was the introduction of more distinct organs of government. Apart from changing the name of the head of the protectorate from commissioner to governor, the Order-in-Council established the Executive Council, consisting of officers such as: i) Director of Finance; ii) Director of Medical Services; iii) Director of Transport; iv) Attorney General; and v) Director of Agriculture. The OIC also established the Legislative Council, as the formal legislative organ of government, exercising legislative powers hitherto held by the Commissioner.

The African Native Authority Ordinance was enacted in 1919.<sup>7</sup> This Ordinance provided for the powers and duties of African chiefs in the colonial indirect system of administration. Under this law the Commissioner could constitute or recognise native councils and determine their powers. Later, the Legislative Council could, with the approval of the Governor, change native law, and by resolution set penalties for breaches of the law.<sup>8</sup> Chiefs were appointed at the village, sub-county and county levels and were accountable to the District Commissioner, who was the executive head of the district and principal representative of the central government.<sup>9</sup> The chiefs had powers to collect taxes, preside over native courts, and maintain law and order.<sup>10</sup> The structure was composed of District Councils, of senior

<sup>2</sup> HF Morris and JS Read *Uganda: The Development of its Laws and Constitution* (1966) 34.

<sup>3</sup> H Ojumbo 'Decentralisation in Africa: A Critical Review of Uganda's Experience' (2012) 15(2) *Potchefstroom Electronic Law Journal* 72.

<sup>4</sup> Morris and Read op cit note 2 at 34.

<sup>5</sup> A Nsibambi 'The restoration of traditional rulers' in HB Hansen and M Twaddle (Eds) *From Chaos to Order: The Politics Of Constitution Making in Uganda* (1994) 42.

<sup>6</sup> GW Kanyeihamba *Constitutional Law and Government in Uganda* (1975) 302.

<sup>7</sup> The African Native Authority Ordinance Entebbe, Government Printer 1919.

<sup>8</sup> Nsibambi op cit note 5 at 35.

<sup>9</sup> Morris and Read op cit note 2 at 42.

<sup>10</sup> *Ibid* at 36.

chiefs. These had authority to change native law and custom and at the same time exercise judicial functions.<sup>11</sup> In addition to this, their role was 'purely deliberative and advisory.'<sup>12</sup>

In the initial stages, the chiefs ruled without a clear set of laws but mainly relied on their local customs and traditions. The status and application of customs and what later came to be known as 'customary law' was to be subject(ed) to the repugnance doctrine under Section 20 of the 1902 OIC. Similarly, Section 12 of the 1902 OIC empowered the Commissioner to make ordinances and other laws but in exercise of this legislative power he was to 'respect existing law and custom in so far as they (were) favouring (of) the individual over the community'. The purpose was not to upset the status quo all of a sudden. However, in so doing, such legislation ended up being very useful in the realm of administrative law since most of the core principles of administrative law such as the protection of public servants, equality, non-discrimination, a bar on abuse or improper use of discretionary powers, are all based on favouring the individual over the powerful state or community.

They were supervised by the District Commissioner but appointed and could only be dismissed by the central government.<sup>13</sup> In the preceding structure, the local people did not have powers to appoint or even remove from office any chief that they thought did not serve to their expectation. In 1949, an African Local Governments Ordinance (revised laws of Uganda, 1951, Cap. 74) was enacted.<sup>14</sup> The African Local Government Ordinance and District Council Proclamations and Regulations of 1949 relatively changed the structure. They established the district as a local government unit with a fairly autonomous administration with the District Councils as its organs.<sup>15</sup>

The District Councils were comprised of elected members who were responsible for the administration of the district. Nonetheless, the central government still retained overriding powers over the District Council decisions. In this structure, the kingdoms (Buganda, Toro, Ankole) were administrative units which did not operate as federal states within the system. Regulations were made under the African Local Governments Ordinance.<sup>16</sup> According to these, the districts outside of Buganda were to have local government jurisdiction over Africans only; the local governments were to be composed of chiefs, district councils and lower councils.<sup>17</sup> Persons to serve on the local governance units were elected to the councils and it is from these councils that those that served on higher councils in the hierarchy were elected.<sup>18</sup>

---

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Morris and Read op cit note 2 at 37.

<sup>15</sup> The African Local Government Ordinance and District Council Proclamations and Regulations of 1949.

<sup>16</sup> Revised Laws of Uganda, 1951, Cap. 74.

<sup>17</sup> Morris and Read op cite 3 at 37.

<sup>18</sup> Ibid.

On the whole, local governance structures for most part during the above phase were not necessarily for the benefit of the people; but mostly facilitation of indirect rule and ensuring a tight grip on the colonised.

### 3. AN EXAMINATION OF ADMINISTRATIVE LAW POST 1995

Judicial review refers to the court's power to assess the actions of other branches or levels of government, especially the court's power to invalidate legislative and executive actions as being unconstitutional.<sup>19</sup>

In Uganda, contemporary judicial review finds its basis in the Constitution, the Judicature Act Cap 13 and the Judicature (Judicial Review) Rules 11/2009. Article 42 of the 1995 Constitution provides that '[a]ny person appearing before any administrative official or body has a right to be treated justly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her'.

Section 36(1) of the Judicature Act provides that the High Court may upon an application for judicial review, make an order, as the case may be, of; (a) *mandamus*, requiring any act to be done; (b) prohibition, prohibiting any proceedings or matter; or (c) *certiorari*, quashing any decision of the lower tribunal. Section 36(2) also provides that no order of *mandamus*, prohibition or *certiorari* may be made in any case in which the High Court is empowered by the exercise of the powers of review or revision contained in that or any other enactment to make an order of like effect as would be rendered unnecessary. Judicial review is an inherent power of the High Court in this regard.

The importance of remedies generally is reflected in the maxim *ubi ius ibi remedium*—where there is a right, there is a remedy. It is axiomatic that a legal right is of little, if any use, unless accompanied by an effective remedy. Remedies should be effective in terms of both procedure and effect, that is to say, the procedure for obtaining the remedy should be clear, simple and speedy and the remedy once granted should be suitable to protect the legal right from infringement and/or to compensate the victim for such infringement.

In the case of *Loyola v Inspector General of Government*<sup>20</sup> Judge Stephen Musota laid down the principles concerning judicial review and prerogative orders as follows:

They are not aimed at providing final determination of private rights which is done in normal civil suits. The said orders are discretionary in nature and [the] Court is at liberty to refuse to grant any of them if it thinks fit to do so even depending on the circumstances of the case where there had been clear violation of the principle of natural justice: The discretion ... has to be exercised judicially and according to settled principles. It has to be based on common sense as well as justice ... Court has to give consideration to all relevant matters of the cause before arriving at a decision in exercise of its discretion.

<sup>19</sup> Bryan A. Garner (ed) *Black's Law Dictionary* (2011) 852.

<sup>20</sup> *Loyola v Inspector General of Government* Misc Cause No. 059 of 2016 at para 14.



The above dictum by Judge Musota was rendered while agreeing with the decision in *Koluo Joseph Andres and 2 Ors v Attorney General*<sup>21</sup> where, at paragraph 23, it was held that:

It is trite law that Judicial Review is not concerned with the decision in issue per se but with the decision-making process. Essentially Judicial Review involves the assessment of the manner in which the decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality.

The Judge further stated at paragraph 26 that: The purpose of Judicial Review is to ensure that the individual receives fair treatment not to ensure that the authority after according a fair treatment reaches on a matter it is authorized or enjoined by law to decide from itself a conclusion which is correct in the eyes of the Court. The Court also relied on the case of *An Application by Bukoba Gymkhana Club*:<sup>22</sup>

In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety ... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere [to] and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.

However, it must again be remembered that the judicial power here is one of review. A decision challenged cannot be overturned on the merits and a fresh decision substituted. The decision-maker is free to render the decision afresh, provided they do so within the law. As Judge Elizabeth Musoke observed in *Kihika v Igeme Nabeta and 6 others*,<sup>23</sup> judicial review 'is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality'.

In the case of *Proline Soccer Academy v Lawrence Mulindwa and 4 others*,<sup>24</sup> at paragraph 21, Justice Yorokamu Bamwine defined judicial review by stating that:

The legal authorities show that the primary object of the prerogative orders of *certiorari* and prohibition is to make the machinery of government operate properly and in the public interest. Judicial Review is concerned not with the decision per se but the decision-making process. Essentially, it involves an assessment of the manner in which a decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, for instance in the instant matter that the applicant is or is not entitled to participate in the National Super League being organized by the respondents, but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality.

<sup>21</sup> *Joseph Andres and 2 Ors v Attorney General* Misc. Cause No. 106 of 2010.

<sup>22</sup> *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 484.

<sup>23</sup> *Kihika v Igeme Nabeta and 6 others* Misc. Cause No. 88 of 2014.

<sup>24</sup> *Proline Soccer Academy v Lawrence Mulindwa and 4 others* HCT-00-CV-MA-0459-2009.

The import of this decision is that administrative law is primarily concerned with the arbitrary exercise of powers of public bodies and not necessarily private bodies.

*Certiorari* and prohibition are similar in effect, with the essential difference between them being one of timing. These (remedies) are granted at the suit of the Crown, and they are 'prerogative' because they (were) originally available only on the Crown and not on the subject.<sup>25</sup> *Certiorari* lies to quash a decision already made; prohibition to prevent the commission of a future act which would be *ultra vires* or in breach of natural justice. The remedies are often complementary, with *certiorari* quashing a decision already reached and prohibition controlling the legality of future decisions. They are discretionary. *Mandamus* compels the performance of a public duty (which nowadays is most usually a statutory duty). Whereas *certiorari* and prohibition serve to control illegal acts, *mandamus* serves to compel a public authority to act where it has failed in its duty to do so. A statutory duty must also be performed within a reasonable time and *mandamus* lies to compel such performance.

According to Ssekaana, the purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. Judicial review is only available against a public body in a public law matter.<sup>26</sup> In essence, two requirements need to be satisfied; firstly, the body under challenge must be a public body whose activities can be controlled by judicial review. Secondly, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights.

A critical development in the post-1995 period has been the expansion of the power of judicial review beyond its apparent limits under the common law. The common law appears to emphasise the distinction between public and private law. Public law regulates the relations between individuals and government agencies and between government agencies. Private law regulates the relations of private persons. The distinction is necessary because it has been felt necessary to subject the government to a special regime of laws which can either give it greater freedom or restrain this freedom. In private law the role of the courts is essentially only to apply the law. Some government activities (contracts and torts) are of course also regulated by the private law regime. The public law nature of the activity does not depend solely on whether it is being exercised by a public authority but also on whether it was being exercised in the interest of a public function.<sup>27</sup> Public law only serves to regulate the conduct of decision-makers in the public sphere. If the decision-maker is not a public body, judicial review will ordinarily not be available. Instead, an action in private law must be pursued. In deciding whether a body is

<sup>25</sup> HWR Wade and CF Forsyth *Administrative law* (2014) 500.

<sup>26</sup> M Ssekaana *Public Law in East Africa* (2009) 37.

<sup>27</sup> Abebe F 'Notes on administrative law: French and English experience' 4(1) *Mizan Law Review*, 160.

a 'public' body for this purpose, the courts will consider both the source and the nature of the power being exercised.<sup>28</sup>

The case of *Arua Kubala Park Operators and Market Vendors Cooperative Society Limited v Arua Municipal Council*<sup>29</sup> tackled the public-private dichotomy of judicial review. In this case, the respondent made a decision to terminate a contract in which the applicant had won the bid. The applicant sought the decision to be subjected to judicial review and quashed (cancelled) and that the contract be re-instated. Justice Stephen Mubiru, at paragraph 33, observed that:

Judicial review of administrative action is a procedure by which a person who has been affected by a particular administrative decision, action or failure to act by a public authority, may make an application to the High Court, which may provide a remedy if it decides that the authority has acted unlawfully. While it has been said that the grounds of judicial review 'defy precise definition', most, if not all, are concerned either with the processes by which a decision was made or the scope of the power of the decision-maker. *A key question that often arises at the commencement of judicial review challenges is whether the decision challenged is a public law decision and therefore amenable to judicial review or a private law decision and not.* At the heart of the problem is that it is possible to act in both capacities at the same time. Just because the decision-making body is a public body it does not necessarily follow that its actions should be governed by public law principles. [Emphasis added.]

Public Law has been described as the system which enforces the proper performance by public bodies of the duties which they owe the public while private law, on the other hand, is concerned with enforcement of personal rights of persons, human or juridical, such as those emanating under property, contract, duty of care under tort and mainly regulates relations between private persons. Not every act of a statutory body necessarily involves an exercise of statutory power. Some statutory duties imposed on public bodies may still create private rights in favour of individuals; enforceable by way of ordinary claim only. In addition, public bodies perform private law acts all the time in respect of which they can sue and be sued in private law proceedings: breaches of contract and covenants in leases and tenancy agreements, nuisance and negligence, employment of staff, personal injury, etc. are examples. It is therefore always necessary to analyse the nature of the decision or act to decide whether it is properly classified as existing in public or private law, given that for judicial review to be the appropriate form of challenge, it is necessary that the decision or act exists in public law.<sup>30</sup>

The case of *R v East Berkshire Health Authority ex parte Walsh*<sup>31</sup> was cited as an illustration. The case involved an application for *certiorari* by an employee of a public body, namely a senior nursing officer of the East Berkshire Health Authority, whose services were terminated by the District Nursing Officer, on the recommendation of a committee of inquiry. He then took two parallel steps. He first set in motion the appropriate industrial dispute procedure and then applied for *certiorari* to quash his dismissal and any subsequent appellate proceedings thereto. In

<sup>28</sup> Ibid.

<sup>29</sup> *Arua Kubala Park Operators and Market Vendors Cooperative Society Limited v Arua Municipal Council* Misc Cause No. 0003 of 2016.

<sup>30</sup> Ibid.

<sup>31</sup> *R v East Berkshire Health Authority ex parte Walsh* [1984] 3 WLR 818.

relation to the preliminary point raised by the health authority that the judicial review proceedings were incompetent, as relating to a matter of private law, Sir John Donaldson MR said:

The remedy of judicial review is only available where an issue of ‘public law’ is involved but ... the expressions ‘public law’ and ‘private law’ are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since English Law traditionally fastens not so much upon principles as upon remedies. On the other hand, to concentrate on remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of ‘*certiorari*’ might well be available if the health authority is in breach of a ‘public law’ obligation but would not be if it is only in breach of a ‘private law’ obligation.<sup>32</sup>

A similar decision is to be found in *Regina v Civil Service Appeal Board Ex Parte Bruce*,<sup>33</sup> where May LJ, said:

I think that at the present time in at least the great majority of cases involving disputes about the dismissal of an employee by his employer, the most appropriate forum for their resolution is an industrial tribunal (now of course an employment tribunal). The Courts should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure.<sup>34</sup>

It has been said that what must be identified to distinguish private matters from public matters (subject to judicial review) ‘is a feature or a combination of features which impose a public character or stamp on the act’.<sup>35</sup> What is needed, however, is some guidance as to what ‘public’ might mean in this context. As Dyson LJ has explained:

The question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging.<sup>36</sup>

Thus, notwithstanding that the complaint is against a public body, it is a prerequisite that the right sought to be enforced is a public law right rather than a private law right. In other words, that the decision infringed upon a right entitled to protection under public law. There must be a public dimension to justify having recourse to relief by way of judicial review and where a transaction is unrelated to the public interest an aggrieved party has a remedy in private law.<sup>37</sup>

To bring an action for judicial review, it is a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed

<sup>32</sup> *Ibid* at at 824.

<sup>33</sup> *Regina v Civil Service Appeal Board Ex Parte Bruce* [1988] ICR 649.

<sup>34</sup> *Ibid* at 757.

<sup>35</sup> See *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2002] QB 48, at para 65, per Lord Woolf CJ.

<sup>36</sup> *R (Beer t/a Hammer Trout Farm) v. Hampshire Farmers’ Markets Ltd* [2004] 1 WLR 233, at pp. 240–241.

<sup>37</sup> *Arua Kubala Park Operators and Market Vendors Cooperative Society Limited v Arua Municipal Council* Misc Cause No. 0003 of 2016.

by the public at large. The 'public' nature of the decision challenged is a condition precedent to the exercise of the courts' supervisory function. If the relationship is governed by private law (no matter how ineffective), then judicial review is apparently unavailable. In disputes arising from the performance of contracts as in this case, it is then reasonable to look at the availability and effectiveness of contractual remedies. If these remedies were available and effective, the court would decline to exercise its judicial review discretion.<sup>38</sup>

The court went on to expound this point by stating that there is a dichotomy between the 'decision-making' and 'executive' functions of a public authority. The former involves the exercise of discretionary powers invested in the authority by Parliament and which are for the authority to exercise rather than for the court. Those functions can only exist in public law. The latter functions are no more than the implementation of the public law decision and should be enforced by private action. Therefore, judicial review applies only to a public authority's capacity to contract and not the terms of the contract itself. There may well be cases in which a true public law claim vitiates a contractual claim, for example if a public authority takes a decision to terminate a contract where such decision is made in bad faith. In the exercise of its supervisory jurisdiction, the court may well quash the decision.

But all that means is that the public authority is free to take the decision again; and if it reaches the same decision in good faith, the contract will be terminated. Where a relationship is regulated by the law of contract, administrative law remedies should generally not be available. It is important that parties are held to their contractual obligations through ordinary suits and not by invoking public law remedies. A party should not take advantage of public law simply because it contracted with a public body, and thereby obtain an advantage in the enforcement of that contract, that would otherwise not be available against a non-public body or private person.<sup>39</sup>

In *Fuelex Uganda Limited v Attorney General and Ors*<sup>40</sup> it was held that the emerging practice whereby litigants in judicial review proceedings tend to present any non-persons as respondents to applications is wrong. According to the Court, while it could issue a judicial review order against a non-legal entity, and while it was clearly part of the essence of the objective of the supervisory jurisdiction of the High Court to ensure that the machinery of government operate in a proper manner, that did not mean that non-legal entities should be parties to judicial review proceedings. The law requiring that only legal entities may be parties to civil proceedings remained in place in all instances of civil proceedings, including judicial review.

However, in other instances judges in Uganda appear to have expanded the traditional boundaries of judicial review that strictly maintained the public-private dichotomy in seeking redress from decisions of private actors and those of public

---

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> *Fuelex Uganda Limited v Attorney General and Ors* [2014] UGHCCD 104.

bodies. Indeed, the blurring of the public-private dichotomy can be illustrated in the following case.

In *International Development Consultants Limited v Jimmy Muyanja and 2 Others*<sup>41</sup> the applicant filed an application for judicial review against the first respondent acting in his capacity as the Executive Director of the second respondent, the Centre for Arbitration & Dispute Resolution (CADER), and the third respondent in his personal private capacity and not in his capacity as the arbitrator, seeking, among others, an order of *certiorari* quashing the proceedings, rulings and orders of the second respondent. In resolving the issue as to whether the court had jurisdiction to entertain the application, Justice Musa Ssekaana stated, at paragraph 35 that:

Firstly, the jurisdiction of the court on an application for Judicial Review is established by Art. 42 of the Constitution which provides ‘a right to fair and just treatment for any person appearing before any administrative official or body and a right to apply to court in respect of any administrative decision taken against any such person.’ The jurisdiction is further amplified by Sect. 36(1)(a), (b) & (c) of the Judicature Act Cap 13 and Rules 3(1)(a), (b) & (2)(a), (b) and (c) of The Judicature (Judicial Review) Rules, 2009. Undoubtedly therefore, the court is clothed with jurisdiction to entertain an application for judicial review and to grant the orders sought. The main contention in issue is whether the court has jurisdiction to entertain the current application in light of the provisions of section 9 of the Arbitration & Conciliation Act Cap 4 (hereinafter referred to as the ACA) which provides thus; ‘Except as provided in this Act, no court shall intervene in matters governed by this Act.’

He further explained that the statutory provision was an ‘ouster clause’ the rationale of which was that the legislature having conferred decision making powers on administrative bodies may seek to limit, preclude or oust the court’s jurisdiction to scrutinise those powers. He was therefore dealing with the issue as to whether in the present case section 9 of the ACA could be relied upon to exclude the judicial review of the court.

He relied on the decision in *Fr. Francis Bahikirwe Muntu and 15 Ors v Kyambogo University*<sup>42</sup> where Judge Remmy Kasule held that: ‘The right to apply for judicial review is now constitutional in Uganda. Article 42 gives one, before an administrative official or body, a right to be treated fairly with a right to apply to a court of law regarding an administrative decision taken against such a person. The right to just and fair treatment cannot be derogated according to Article 44’.<sup>43</sup>

While deciding the issue in the affirmative, Judge Ssekaana, at paragraph 40, held that:

The exercise of power by persons not authorized by the Act can indeed be a subject of judicial review and does not in any way conflict with section 9 which bars intervention in matters governed by the Arbitration and Conciliation Act. It therefore follows that Arbitration must be carried out in a way that is consistent with Constitutional principles

<sup>41</sup> *International Development Consultants Limited v Jimmy Muyanja and 2 Others* [2019] UGHCCD 6.

<sup>42</sup> *Fr. Francis Bahikirwe Muntu and 15 Ors v Kyambogo University* Misc. Application No. 643 of 2005 (Unreported).

<sup>43</sup> *Ibid* at 7.

and values and any derogation thereof may be challenged as being unconstitutional and thus invalid. ... It therefore follows that Arbitration must be carried out in a way that is consistent with Constitutional principles and values and any derogation thereof may be challenged as being unconstitutional and thus invalid.

The second issue dealt with whether the application was properly brought against the ' third respondent as it was brought against him in his personal private capacity instead of bringing the application in his capacity as the Arbitrator. Furthermore, since the third respondent was not a public officer or a public institution, the option of judicial review of his decision was not amenable. The Judge relied on his published work, in which he had stated:

The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. Judicial review is only available against a public body in a public law matter. In essence, two requirements need to be satisfied; first, the body under challenge must be a public body whose activities can be controlled by judicial review. Secondly, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights.<sup>44</sup>

He postulated that a party may be joined in a suit not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the cause or matter. Since the application sought an order of *certiorari* to quash the proceedings and also sought specific orders against the third respondent, it made him an indispensable party whose participation was required for purposes of rendering a judgment and his rights (appointment) would be directly affected by the disposition of the case.

The court in the case of *Proline Soccer Academy v. Lawrence Mulindwa & 4 Ors* (HCT-00-CV-MA-0459-2009)<sup>45</sup> in which one of the respondents was an unincorporated association without capacity to sue and/or be sued held that there was no requirement that prerogative orders should only issue to public bodies and offices that had corporate personality. The court relied on the case of *John Jet Tumwebaze v Makerere University Council & Ors*<sup>46</sup> in which the court opined that:

If the legislature desired that these orders issue only against bodies clothed with corporate personality, the legislature would have expressly stated so. It did not. The wide jurisdiction given to court as to the public bodies and officers at which prerogative orders can be directed must not be narrowed down by restricting their issuance to only those bodies clothed with corporate personality.

Another important development has been the extension of administrative law into matters of a criminal nature. An example in this regard is provided by the case of *Uganda v Robert Sekabira & 10 Ors*<sup>47</sup> in which the Court observed that in the

<sup>44</sup> Ssekaana op cit note 26 at 37.

<sup>45</sup> *Proline Soccer Academy v Lawrence Mulindwa & 4 Ors* HCT-00-CV-MA-0459-2009.

<sup>46</sup> *John Jet Tumwebaze v Makerere University Council & Ors* H.C Civil Application No. 353 of 2005 (unreported).

<sup>47</sup> *Uganda v Robert Sekabira & 10 Ors* H.C. Cr. Case No. 0085 of 2010.

process of producing and presenting suspects in Courts, the police and the prosecution usually violated numerous constitutional rights of accused persons, and that even where such violations were brought to the notice of Courts, the prosecution went ahead as if nothing had gone amiss. In this context, the Court observed that English authorities were also extremely instructive and noted that in *R vs. Horseferry Road Magistrates Ex parte Bennet*<sup>48</sup> the House of Lords stated:

‘... it is the function of the High Court to ensure that the executive action is exercised responsibly and as parliament intended. So also it should be in the field of criminal law and if it comes to the attention of the Court that there has been a serious abuse of power it should, in my view express its disapproval by refusing to act upon it ... The Courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power regarding their behaviour as an abuse of process and thus preventing a prosecution.’

The divorce of public and private law and the eventual fallacy of the dichotomy had led different procedural requirements and the impossibility of dividing public and private law especially when it came to duties of public authorities.<sup>49</sup> This scenario is a rather radical departure from the traditional notion as noted by Olujede thus:

In modern administrative law, certiorari, prohibition and mandamus form the actual realm of prerogative remedies. ‘Certiorari and prohibition are both part of the machinery for controlling the administration of justice, which is primarily the Crown’s (State’s) concern. Both remedies issue from the High Court, and both are designed to keep inferior courts (tribunals or administrative bodies) within their proper jurisdiction.’<sup>50</sup>

This is in line with Section 36 of the Judicature Act of Uganda which states that:

- (1) The High Court may make an order, as the case may be, of—
  - (a) an order of mandamus requiring any act to be done;
  - (b) an order of prohibition, prohibiting any proceedings or matter;
  - (c) an order of certiorari; removing any proceedings or matter to the High Court.<sup>51</sup>

The Judicature (Judicial Review) Rules, state that ‘an application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the application shall be made.’<sup>52</sup> Unlike mandamus which is distinct and clear, the difference between certiorari and prohibition is best underscored by Olujede as:

These two prerogative orders are very similar and they are hand-in-glove. The difference, however, between the two orders is, essentially, that the order of certiorari operates to quash a decision that has been made in excess of legal authority. On the other hand the order of prohibition operates to prevent an authority from acting in excess of its legal authority before the authority has completed its proceedings.<sup>53</sup>

<sup>48</sup> *R vs. Horseferry Road Magistrates Ex parte Bennet* [1994] 1 A. C. 42.

<sup>49</sup> Wade and Forsyth op cit note 34 at 568.

<sup>50</sup> PO Olujede *Administrative Law in East Africa* (2010) 184.

<sup>51</sup> The Judicature Act, Cap. 13.

<sup>52</sup> Sections 3 and 5 of The Judicature (Judicial Review) Rules, 2009 (No. 11 of 2009).

<sup>53</sup> PO Olujede op cit note 50 at 187.



This is a great observation, as not all hope is lost for a person who fails to apply for an order of prohibition on time since he or she can apply for an order of certiorari after the decision has been made, asking court to quash (cancel) the decision.

#### 4. CONCLUSION

The post-1995 era has seen an evolution in the principles of administrative law especially in terms of the traditional public-private dichotomy that existed in English administrative law.

The new trends created by the Ugandan judiciary as discussed show that the judges are expanding the scope of administrative law remedies to private actors thus extending the remedies available to private persons to include formerly exclusively public law remedies. This development is in line with Article 42 of the Constitution which (merely) states that 'any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.'<sup>54</sup> It is clear and apparent that Article 42 does not distinguish between the public and private (sectors) and therefore the remedies which accrue as a result of any application made based on this constitutional provision should be enjoyed by both (those) in the public and private sectors. Article 42 is worded in such a way that it creates the right to just and fair treatment in administrative decisions. Similarly, Article 20(2) of the Constitution notes that 'the rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.' Thus, whereas the traditional English administrative law created a distinction between the public and private sectors, this divide has now been blurred by the 1995 Constitution of the Republic of Uganda among other laws in the post-1995 era giving a positive outcome of an evolution in the principles of administrative law to cover both the public and private sectors.

---

<sup>54</sup> Constitution of the Republic of Uganda (1995), Cap. 1.

# Administrative Justice in South Africa: An Overview of Our Curious Hybrid

LAUREN KOHN\* AND HUGH CORDER†

## ABSTRACT

Administrative law in South Africa has undergone a thorough process of reform since the advent of a democratic constitutional system in 1994. With its roots firmly in judicial review of administrative action along the common-law approach in its English antecedents, the track record of the courts before 1994 was dismal, given their overweening deference to the excessive abuse of discretion by the executive. This created the ideal foundation for thorough reform of the administrative review system, which was initiated by the inclusion in the transitional Bill of Rights of 1993 of a right to administrative justice. Such a right was subsequently included in the final Constitution of 1996, in a simplified and more extensive format, complemented by the rights of access to information and access to court. An additional requirement was the drafting and enactment by Parliament of legislation to

provide greater detail in respect of the rights, which was accomplished by early 2000. However, the unduly complex definition of the key gateway to judicial review, that of “administrative action”, together with the necessity that executive action also be subjected to constitutional review by the courts, led to the development of an alternative and vigorous pathway to review, through the principle of legality. The interplay between these two avenues to achieve judicial review of the exercise of public power, together with the establishment and development of non-judicial means of review, such as the office of the Public Protector, and the necessity for an appropriate approach to judicial deference to the executive under the separation of powers doctrine, have dominated the post-apartheid jurisprudence in this area, and are spelled out in this chapter.

## 1. BACKGROUND AND DEVELOPMENT

Context matters and the South African system of administrative law is quite evidently a product of the particular socio-political context out of which it evolved, and a response to current context in which it operates. It is a curious hybrid of the old and the new: in part, due to its common-law roots, it still bears the stamp of

\* BBusSci LLB (UCT) LLM (UCT). Currently an external PhD Candidate (and Fellow) at Leiden Law School in the Netherlands. Senior lecturer, Administrative & Constitutional Law. Attorney of the High Court of South Africa.

† B Com LLB (Cape Town) LLB (Cantab) D Phil (Oxon). Professor of Public Law, University of Cape Town.

This contribution is a more extensive and updated version of Lauren Kohn & Hugh Corder ‘Judicial Regulation of Administrative Action’ in Christina Murray and Coel Kirkby (eds) *South Africa Constitutional Law in International Encyclopaedia of Laws—Suppl.* 108 (2014), (Kluwer, Netherlands), Part IV, Chapter 4, pp 253–277. We acknowledge, with thanks, permission from the editors and publishers of the earlier version to revise it for present purposes.

the country's unfortunate apartheid heritage, yet at the same time it is a field of law that epitomises the negotiated constitutional 'revolution'<sup>1</sup> that indelibly changed the South African legal landscape. Chaskalson P explained the implications of this transformation in the benchmark decision of *Pharmaceutical Manufacturers*:<sup>2</sup>

[A]dministrative law occupies ... a special place in our jurisprudence ... It is built on constitutional principles ... Prior to the coming into force of the interim Constitution, the common law was 'the main crucible' for the development of these principles of constitutional law. The interim Constitution ... was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of the common law to the precepts of a written constitution which is the supreme law.<sup>3</sup>

Prior to this shift, South African administrative law was entirely common-law based and bore all the hallmarks of its parent English system. In particular, thanks in large part to the influence of the English constitutional lawyer, Albert Venn Dicey, it rested upon the twin pillars of parliamentary sovereignty and the rule of law with its obverse facet, the *ultra vires* doctrine (which operated as the organising rationale of administrative law). Along with this Westminster inheritance came a deep distrust of government and discretionary power, and a concomitantly heavy reliance on judicial review of administrative action as the principal means of checking such power. Unfortunately, transplanted into the South African context, these two key organising principles of English constitutional law failed to complement one another. Under apartheid, parliamentary sovereignty came to be associated with rule by law,<sup>4</sup> rather than a substantive notion of the rule of law pursuant to which law is insulated from politics, and judges serve as impartial and independent guardians of human rights. The separation of powers did not exist as a practical reality and parliamentary sovereignty came to be coupled with judicial timidity as the hamstrung courts struggled to find ways of regulating public power, which was largely abused in pursuit of racist ends.

The 'old' administrative law was thus 'underdeveloped and functioned in an undemocratic system that was antagonistic to fundamental rights and was secretive as well as unaccountable.'<sup>5</sup> It was, in many respects, what Dean termed a 'dismal science',<sup>6</sup> and unfortunately this 'science' was the sole legal interface between citizen and state. This in turn meant that when administrative law was employed to achieve just outcomes, it operated as a kind of an informal, small-scale Bill of Rights. Given this genesis, it evolved in a fairly casuistic manner and was spread thin having to do the work of, for example, what would now be addressed through

<sup>1</sup> Iain Currie & Johan de Waal *The new constitutional & administrative law* (2001) at 37.

<sup>2</sup> *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC).

<sup>3</sup> *Ibid* para 45.

<sup>4</sup> David Dyzenhaus 'The pasts and future of the rule of law in South Africa' (2007) 124 *South African Law Journal* 734 at 738.

<sup>5</sup> Clive Plasket 'Post-1994 administrative law in South Africa: the Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the Common Law' (2007) *Speculum Juris* 25.

<sup>6</sup> WHB Dean 'Our administrative law: A dismal science?' (1986) *South African Journal on Human Rights* 164.

labour law, equality law, access to information law and so on.<sup>7</sup> In the absence of an overarching legitimating constitutional and political theory to underpin it, the broad spectrum of common-law principles of administrative law lacked both consistency and coherence. The dawn of the constitutional era, based upon the founding values of (amongst others) constitutional supremacy, the rule of law, accountability, responsiveness and openness,<sup>8</sup> brought with it these fundamental theoretical underpinnings; primarily in the form of a full-scale Bill of Rights. With this shift came a shrinking of the social function of administrative law review,<sup>9</sup> which no longer has to operate as the primary bulwark against state excesses.

In 1994, the Interim Constitution<sup>10</sup> introduced, (in somewhat technical language) a substantial set of administrative justice rights,<sup>11</sup> including the fundamental entitlements to lawful<sup>12</sup> and procedurally fair<sup>13</sup> administrative action. In addition, 'every person' was afforded the right to be given written reasons for administrative action affecting his or her 'rights or interests'.<sup>14</sup> Furthermore, given the limited life of the Interim Constitution and the fraught nature of the constitutional negotiations which produced it, the right stopped short of including review for reasonableness. As a compromise aimed at balancing administrative efficiency with accountability, the notion of 'justifiability' was introduced as an additional ground of review, in that 'every person' was given the right to 'administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened'.<sup>15</sup> These twin requirements of reason-giving and justifiability were welcomed as a bold break from the past.

The enactment of the (Final) Constitution in 1996<sup>16</sup> brought with it a more straight-forward composite administrative justice right. Section 33 states:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
  - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - (c) promote an efficient administration.

<sup>7</sup> Hugh Corder 'Without deference, with respect: A response to Justice O'Regan' (2004) *South African Law Journal* 438 at 439.

<sup>8</sup> Section 1(d) of The Constitution of the Republic of South Africa, 1996.

<sup>9</sup> Kate O'Regan 'Breaking ground: some thoughts on the seismic shift in our administrative law' (2004) 121 *South African Law Journal* 424 at 429.

<sup>10</sup> The Constitution of the Republic of South Africa Act 200 of 1993 ('the Interim Constitution').

<sup>11</sup> *Ibid* at s 24.

<sup>12</sup> *Ibid* at s 24(a).

<sup>13</sup> *Ibid* at s 24(b).

<sup>14</sup> *Ibid* at s 24(c). Emphasis added.

<sup>15</sup> *Ibid* at s 24(d). Emphasis added.

<sup>16</sup> The Constitution (n 8).

The interim administrative justice right remained in force<sup>17</sup> until 3 February 2000, when the constitutionally mandated legislation, the Promotion of Administrative Justice Act<sup>18</sup> ('the PAJA'), was assented to by the President. This Act serves as the primary basis for judicial review of administrative action. Ironically, this 'triumphal legislation'<sup>19</sup> has done more to curtail—rather than enhance—the enjoyment of the administrative justice rights. This is chiefly due to the Act's narrow and overly-complicated definition of the gateway concept of 'administrative action'. As a result, the administrative law of today is suffering from its own form of complexity and inaccessibility, which has in turn led to the emergence of a 'proliferation of pathways' to review<sup>20</sup> in order to capture in the net those exercises of public power which fall short of the PAJA incarnation of 'administrative action', or simply avoid this stumbling block of a definition all together.

The discussion that follows elucidates how the courts have sought to regulate the exercise of public power through each of these modes of review with their underpinning causes of action. We also draw attention, albeit in summary terms, to the non-judicial avenues for challenging, and/or proactively reforming, administrative conduct and the exercise of public power more broadly. These avenues include, for example, the access to information regime which flows from administrative justice's sister right in section 32 of the Constitution,<sup>21</sup> and the Chapter 9 Institutions ('State Institutions Supporting Constitutional Democracy') such as the Public Protector.

## 2. JUDICIAL REGULATION OF THE EXERCISE OF PUBLIC POWER

### (a) *The review/appeal distinction*

Notwithstanding South Africa's radical break from the past, judicial review continues to be the most prominent mechanism for curbing and controlling maladministration and other abuses of public power. It is not however, an unbridled court process. Under the influence of the Diceyan heritage of a 'watchdog' theory of government (as a beast to be shackled rather than empowered) and the adoption of the doctrine of the separation of powers, South African law has endorsed the review/appeal dichotomy as a fundamental principle of administrative law (as well as constitutional review more broadly) and a key mechanism to limit the so-called judicialisation of politics. To this end, the courts' powers of judicial review, though fairly extensive, are limited by virtue of review's formal definitional demarcation from the process of appeal. Both court processes allow the reconsideration of a

<sup>17</sup> In terms of item 23(2)(b) of Schedule 6 to the Constitution (n 8).

<sup>18</sup> Act 3 of 2000.

<sup>19</sup> *Sasol Oil (Pty) Ltd v Metcalfe* NO 2004 (5) SA 161 (W) para 7.

<sup>20</sup> Cora Hoexter *Administrative Law in South Africa* 2ed (2012) at 131.

<sup>21</sup> Section 32 of the Constitution (n 8) grants everyone the right of access to information held by the state, and in private hands (in the latter case, where it is required for the exercise or protection of any rights, which would include the administrative justice rights), and the Promotion of Access to Information Act 2 of 2000 (the 'PAIA') is the constitutionally mandated legislation that gives effect to this right.

decision, but they flow from contrary premises and thus have fundamentally different aims. In terms of this distinction, the appeal process is about determining the correctness of a decision, through an assessment of its substantive merits. It is a more searching process because it requires a court to make a finding as to whether the decision-maker in question was right or wrong. Review, on the other hand, is a less exacting procedure in terms of which the court assesses the decision-making process to determine whether the outcome was arrived at in an acceptable fashion, for example, in an unbiased and rational manner.

Since the advent of constitutional democracy with its emphasis on fairness and reasonableness, this bright-line distinction is dimming as the courts—although not always explicitly—regularly assess the substantive merits of public decision-making in the course of ascertaining whether the decision in question was arrived at in an acceptable fashion.<sup>22</sup> This wider form of review has encouraged a fundamental shift away from an all-or-nothing approach to dispensing administrative justice to a more nuanced context-sensitive approach.

### **(b) *The nature of public powers and functions***

Today, every exercise of public power is to some extent justiciable under the Constitution,<sup>23</sup> even if it falls short of the PAJA definition of administrative action, and indeed in the wake of the curious Constitutional Court judgment in *Gijima*:<sup>24</sup> even if the power does *not* so fall short. Despite its narrowness, the definition has as its touchstone the ‘public’ element of a power or function<sup>25</sup> and it is this overarching (and ever-expanding)<sup>26</sup> criterion that guides the judicial control of state excesses more generally. Administrative law principles thus apply whenever there is action involving the use of public power or the performance of public functions—even when exercised by private entities, which are explicitly included in the purview of

<sup>22</sup> See for example *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45, where O’Regan J noted that, ‘the review functions of the Court now have a substantive as well as a procedural ingredient, [yet] the distinction between appeals and reviews continues to be significant’.

<sup>23</sup> O’Regan J in *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 244.

<sup>24</sup> See *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC). The net effect of this bizarre piece of judicial reasoning is that ‘state self-review’ (namely judicial review of administrative action by the organ of state that took it) is now to be done via the principle of legality rather than the PAJA. See further below at I.I.C.

<sup>25</sup> Sections 1(i)(a)(ii) and 1(i)(b) of the PAJA (n 18).

<sup>26</sup> See for example, *Ndoro v South African Football Association* 2018 (5) SA 630 (GJ) in which the court found that decision-making by private sporting bodies that regulate football without statutory authority may be characterized as a the exercise of public powers capable of review under the PAJA. The court held at paras 29–30 that, ‘[t]hese bodies, (FIFA, SAFA and the NSL) constitute an institutional framework within which a comprehensive scheme of regulations is administered and enforced. Each entity is a private organization. Neither the entities nor their rules derive from public statutes. These associations and their relationships with their members are founded upon contracts. But for all this, as a general matter, it is hard to escape the conclusion that *what these bodies do and the objects they strive after are public in nature*’.

the PAJA.<sup>27</sup> The litmus test for reviewability in South African law is thus whether the power or function in question has a ‘public nature’, or (as was more loosely put in *Ndoro*) whether these powers and functions ‘strive after’ public objects.<sup>28</sup> Precisely what this entails is being determined incrementally (and sometimes rather robustly) by South African courts. It suffices to note that they have moved away from the narrow ‘governmental control’ test which emerged from *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting*,<sup>29</sup> to a broader, more flexible enquiry. This was espoused in *AAA Investments*:<sup>30</sup>

It is true that no bright line can be drawn between ‘public’ functions and private ordering. Courts in South Africa and England have long recognised that non-governmental agencies may be tasked with a regulatory function which is public in character. In determining whether rules are public in character, although made and implemented by a non-governmental agency, several criteria are relevant: whether the rules apply generally to the public or a section of the public; whether they are coercive in character and effect; and whether they are related to a clear legislative framework and purpose.<sup>31</sup>

Once an action is found to fall within this broad class, it may be judicially reviewed via one of the pathways which have emerged over the past 20 years of development, and which we consider in turn.

### 3. THE PATHWAYS TO REVIEW

#### (a) *The PAJA*

The PAJA is the national legislation that was passed to give effect to the rights contained in section 33 of the Constitution. Chaskalson CJ confirmed this in *New Clicks*<sup>32</sup> in which he stressed that, ‘[i]t was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and it purports to do so’,<sup>33</sup> certainly at least in relation to the grounds of review.<sup>34</sup> As a result, and in line with the principle of constitutional subsidiarity,<sup>35</sup> litigants seeking to vindicate their administrative justice rights cannot ‘avoid the provisions of PAJA by going behind it, and seek[ing] to rely on section 33(1) of the Constitution or the common law’,<sup>36</sup> or the more malleable principle of legality-cum-rationality. The PAJA is thus the primary avenue to review, accessed via the definitional hurdle of ‘administrative action’, save where—courtesy of *Gijima*—the reviewing party is the organ of state which carried out the impugned administrative action,<sup>37</sup> in which case

<sup>27</sup> Section 1(i)(b) of the PAJA (n 18) refers to ‘a natural or juristic person ... when exercising a public power or performing a public function in terms of an empowering provision’.

<sup>28</sup> *Ndoro* (n 26) para 30.

<sup>29</sup> 1996 (3) SA 800 (T) at 810F–H.

<sup>30</sup> *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) per O’Regan J.

<sup>31</sup> *Ibid* para 119.

<sup>32</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC).

<sup>33</sup> *Ibid* para 95.

<sup>34</sup> Currie (n 1) at 340.

<sup>35</sup> See further below at II.C.

<sup>36</sup> *New Clicks* (n 32) para 96.

<sup>37</sup> *Gijima* (n 24) as affirmed in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC). See the brief discussion on the practical implications of this judgment at II.C.

conduct which so qualifies within the meaning of the PAJA must nevertheless be challenged via legality review.

During the transitional period, the constitutional incarnation of the animating (if elusive) concept of administrative action was expressed by the Constitutional Court in a significant trilogy of cases—*Fedsure*,<sup>38</sup> *SARFU*<sup>39</sup> and *Pharmaceutical Manufacturers*<sup>40</sup>—through a process of elimination premised on the separation of powers. The different types of legislative and executive action that fell outside the purview of administrative action under section 33, stood instead to be reviewed under the flexible constitutional principle of legality—a crucial discovery to have emerged from this jurisprudential triptych. The pre-PAJA construct of administrative action within the meaning of section 33, through its relative simplicity, strikes the right balance between giving proper effect to the right and ensuring not too onerous a burden on the administration. In comparison, the legislative definition of administrative action in section 1 of the PAJA is a complex and inaccessible mishmash of constituent parts:

‘administrative action’ means any decision taken, or any failure to take a decision, by—  
 (a) an organ of state, when—  
     (i) exercising a power in terms of the Constitution or a provincial constitution; or  
     (ii) exercising a public power or performing a public function in terms of any legislation; or  
 (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...<sup>41</sup>

This restrictive and overly-elaborate definition stands in stark contrast to its laconic, yet substantively generous, underpinning right. It has been sharply criticised by judges, practitioners and academics alike. The Supreme Court of Appeal in *Grey’s Marine*<sup>42</sup> famously lamented it for unduly limiting the meaning of administrative action by ‘surrounding it with a palisade of qualifications’.<sup>43</sup> A discussion of each of these qualifications is beyond the purview of this chapter. Suffice it to highlight the essence of the definition which was summarised as follows by Nugent J in an apparent attempt to read-down the strictures of the PAJA here:

Administrative action is ... in general terms, the conduct of the bureaucracy ... in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.<sup>44</sup>

<sup>38</sup> *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC).

<sup>39</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

<sup>40</sup> *Pharmaceutical Manufacturers* (n 2).

<sup>41</sup> See s 1 of the PAJA (n 18).

<sup>42</sup> *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 21.

<sup>43</sup> *Ibid* ) para 21.

<sup>44</sup> *Ibid* para 24.



The PAJA further curtails the realm of administrative action through the enumeration of various public powers and functions that are excluded from its scope.<sup>45</sup> In large part, these exclusions flow from the separation of powers such that the quintessentially independent judicial function;<sup>46</sup> the policy-laden executive function (associated with a high measure of policy and discretion);<sup>47</sup> and the original law-making function of the legislature at all three levels of government are excluded.<sup>48</sup> A decision 'to institute or continue a prosecution'<sup>49</sup> and a decision relating to the appointment of a judicial officer by the Judicial Service Commission (JSC) are also matters that are outside the PAJA's remit. In addition, the Act specifically excludes<sup>50</sup> any decision taken, or failure to take a decision, in terms of any provision of the PAJA's sister statute, the PAIA<sup>51</sup> which creates its own system of special statutory review. Finally, administrative action under the PAJA excludes<sup>52</sup> decisions taken in terms of section 4(1) ('administrative action affecting the public') which affords administrators a choice of procedure to facilitate public involvement where 'administrative action materially and adversely affects the rights of the public'. By virtue of this exclusion, the administrator's decision regarding the process adopted is final.<sup>53</sup>

Despite the diminished realm of administrative action under the PAJA, once an applicant with the requisite standing to sue<sup>54</sup> is through this gateway, the Act offers a relatively rich array of review grounds which are primarily encompassed in section 6 ('Judicial review of administrative action'). The provisions of this section 'divulge a clear purpose to codify the grounds of judicial review'<sup>55</sup> that were available under the common law. This section gives precise legislative expression to the constitutional rights to lawful, reasonable and procedurally fair administrative action. It is prefixed by section 5 which affords 'any person whose rights have been materially and adversely affected by administrative action' the right to

<sup>45</sup> Section 1(i)(aa)–(ii) of the PAJA (n 18).

<sup>46</sup> Section 1(ee) of the PAJA (n 18).

<sup>47</sup> Section 1(aa)–(cc) of the PAJA (n 18).

<sup>48</sup> Section 1(dd) of the PAJA (n 18).

<sup>49</sup> Section 1(ff) of the PAJA (n 18).

<sup>50</sup> Section 1(hh) of the PAJA (n 18).

<sup>51</sup> The PAIA (n 21).

<sup>52</sup> Section 1(ii) of the PAJA (n 18).

<sup>53</sup> *New Clicks* (n 32) para 132.

<sup>54</sup> The test for standing has been considerably relaxed since the advent of the Interim Constitution, and s 38 ('Enforcement of Rights') in the final Bill of Rights continues this model. The Constitutional Court in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) para 29 held that, '[t]he wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because 'it seems clear that the provisions of section 38 ought to be read into the statute'. This is correct.'

Of course, this clarity of reasoning has been muddled subsequent to *Gijima* which fails to appreciate the distinction between rights bearers with rights enforcers (explicitly contemplated under section 38 of the Constitution which affords standing to anyone acting 'in the public interest') by holding that organs of state seeking to review their own decisions do not have standing under the PAJA (but only under legality). See *Gijima* (n 24) para 38, '[t]he conclusion that PAJA does not apply does not mean that an organ of state cannot apply for the review of its own decision; it simply means that it cannot do so under PAJA'.

<sup>55</sup> *Bato Star* (n 22) para 25.

request written reasons for that action ‘within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of [it]’. Sections 3 and 4 of the PAJA give meaningful content to the flexible prescripts of procedural fairness in respect of individuals and the public respectively. Section 7<sup>56</sup> of the Act delineates the ‘[p]rocedure for judicial review’ and introduces two fairly stringent requirements for applicants. Firstly, it prescribes a 180-day timeframe within which to institute judicial review proceedings,<sup>57</sup> and secondly, by virtue of section 7(2), such proceedings may be instituted only once all internal remedies have been exhausted. In this respect, the PAJA has been criticised for being ‘far more hostile to the right of access to court than the more nuanced common law’,<sup>58</sup> (which applies when the principle of legality is invoked) in terms of which applicants must simply not delay unreasonably—something that organs of state employing state ‘self-review’<sup>59</sup> post-*Gijima* will no doubt exploit. Similarly, although there is a duty to exhaust domestic remedies at common law, this obligation has been enforced sparingly. In order to ameliorate the potential harshness caused by these procedural hurdles in the PAJA, the courts have tended to read down these sections to bring the Act in line with the more flexible common law.<sup>60</sup>

The remainder of the PAJA sets out a generous open-list of ‘[r]emedies in proceedings for judicial review’,<sup>61</sup> and makes provision for the variation of the timeframes for applying for reasons<sup>62</sup> and for instituting a review action.<sup>63</sup> It also sets out ancillary matters including an authorisation to the Minister to make regulations on an array of topics, such as ‘the establishment, duties and powers of an advisory council to monitor the application of [the] ... Act and to advise the Minister’<sup>64</sup> in an effort to improve the system of administrative justice in South Africa. Regrettably, this has not yet come to pass. Such an umbrella body in the nature of an Administrative Justice Advisory Council, would do much to reform the system by making it more integrated and responsive and would likely go some way to reducing the prominence of judicial review with its inherent inefficiencies.<sup>65</sup> We turn now to canvass briefly key aspects of the development of the three

<sup>56</sup> See the recently published Administrative Review Rules in *Government Gazette No. 42740* of 4 October 2019.

<sup>57</sup> Section 7(1) read with s 9(1) of the PAJA (n 18).

<sup>58</sup> Plasket (n 5) at 38.

<sup>59</sup> *Buffalo City* (n 37) paras 38 and 105.

<sup>60</sup> For example, in relation to the duty to exhaust internal remedies, in the case of *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC), the Court held (para 47) that, ‘an aggrieved party must take reasonable steps to exhaust available internal remedies with a view to obtaining administrative redress’, and furthermore, that the requirement should not be employed by administrators to ‘frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny’ (para 38).

<sup>61</sup> Section 8 of the PAJA (n 18) See the discussion on remedies at III below.

<sup>62</sup> *Ibid* at s 9(1)(a).

<sup>63</sup> *Ibid* at s 9(1)(b).

<sup>64</sup> *Ibid* at s 10(2).

<sup>65</sup> See Cora Hoexter ‘The future of judicial review in South African administrative law’ (2000) 117 *South African Law Journal* 484 for a lucid analysis of these shortcomings.

primary grounds of review—lawfulness, reasonableness and procedural fairness—under the PAJA, as expounded through case law.

(i) *Lawfulness*

Perhaps the most vital organising rationale of administrative law is the requirement of lawfulness, or legality, pursuant to which every incident of public power must be sourced in, and carried out in exact accordance with, a lawful empowering source. Quintessentially this would be legislation, but when it comes to a natural or juristic person performing administrative action, the PAJA makes reference to the broad notion of ‘an empowering provision’,<sup>66</sup> which is indicative of the legislative recognition of the fact that public powers exercised by private bodies may be sourced in a variety of instruments, such as contract and the rules of private organisations. But when organs of state exercise public powers amounting to administrative action, the PAJA makes it plain that they must be sourced in hard law; namely legislation or a Constitution.<sup>67</sup> Public power is thus not self-generating and in this respect, the notion of lawfulness flows from the rule of law itself and lies at the heart of our constitutional order.

In *Fedsure*,<sup>68</sup> the Constitutional Court laid the foundations for the development of the constitutional principle of legality. The Court held that, ‘[it is] central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.’<sup>69</sup> This pivotal aspect of legality is the requirement of *authority* and it, in particular, has animated the jurisprudence on legality which has centred on the rule against *unlawful delegation* of power.

The rule against unlawful delegation flows from the Latin maxim, *delegatus delegare non potest*, in terms of which a person performing a delegated function may not further delegate the performance of that function to another person or institution.<sup>70</sup> This accords with a common-sense appreciation that the legislature chooses the so-called right person for the job and this must be adhered to, save where there is express or implied legislative authority to extend the power to someone else. The PAJA gives expression to this rule by allowing the review of administrative action where, ‘the administrator who took it ... acted under a delegation of power which

<sup>66</sup>This notion is broadly defined in s 1(vi) of the PAJA (n 18) to mean ‘a law, a rule of common law, customary law, or an agreement, instrument or other documents in terms of which an administrative action was purportedly taken’.

<sup>67</sup>Section 1(i)(a) of the PAJA (n 18). See on the question of the source of administrative power when exercised by an organ of state, the intriguing set of judgments in *South African National Parks v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA). The dissent by Rogers AJA is compelling for its fealty to the wording of the PAJA here and the rule of law’s requirement of legal certainty, though some might criticise it as overly formalistic given the kind of substantive reasoning called for by our transformative Constitution.

<sup>68</sup>*Fedsure* (n 38).

<sup>69</sup>*Ibid* para 58.

<sup>70</sup>*AAA Investments* (n 30) para 126.

was *not authorised* by the empowering provision'.<sup>71</sup> Practically, therefore, much turns on an interpretation of the legislative scheme in issue.

The rule against unlawful delegation is thus subject to limitation in that it is recognised that in the modern bureaucratic state, delegation (or, sub-delegation if done not by an original legislator, but by an administrator with delegated power) is necessary for the 'daily practice of governance'.<sup>72</sup> Section 238 of the Constitution contemplates this inevitability:

An executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function performed.<sup>73</sup>

The courts have, in allowing exceptions to the general rule that delegated power must be exercised by the administrator on which it is conferred, formulated open-list criteria to determine whether a delegation is acceptable. These were elucidated in *AAA Investments*:

The character of the original delegation; the extent of the delegation of the delegated power; the extent to which the original delegee continues to review the exercise of the delegated power; considerations of practicality and effectiveness; and the identity of the institutions or persons by whom and to whom power is delegated.<sup>74</sup>

The other two broad requirements of legality are what have been termed in the literature and case law as: *jurisdiction* and *abuse of discretion*. Jurisdiction is, in essence, the requirement that administrators remain within the substantive and procedural bounds of their powers and do not misconstrue them. Abuse of discretion is an umbrella ground which covers the field when it comes to bad decision-making and has been fleshed out in some detail in the PAJA. In this respect, the Act gives statutory form to most of the common-law constraints on the exercise of discretionary powers. It includes, for example, the requirement that administrative action not be taken: 'for an ulterior purpose or motive';<sup>75</sup> 'because irrelevant considerations were taken into account or relevant considerations were not considered';<sup>76</sup> 'in bad faith';<sup>77</sup> and 'arbitrarily or capriciously'.<sup>78</sup> As these manifestations of abuse of discretion should make clear, in practice this aspect of lawfulness tends to overlap with the more malleable notion of reasonableness.

The first basis on which a court can review administrative action for want of jurisdiction is where an administrator interprets a legislative provision wrongly, even if inadvertently. Such an incorrect interpretation typically prevents administrators from appreciating the true nature and ambit of their powers and thus leads to them

<sup>71</sup> Section 6(2)(1)(ii) of the PAJA (n 18).

<sup>72</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 54.

<sup>73</sup> Section 238(a) of the Constitution (n 8).

<sup>74</sup> *AAA Investments* (n 30) para 127.

<sup>75</sup> Section 6(2)(e)(ii) of the PAJA (n 18).

<sup>76</sup> *Ibid* at s 6(2)(e)(iii).

<sup>77</sup> *Ibid* at s 6(2)(e)(v).

<sup>78</sup> *Ibid* at s 6(2)(e)(vi).

exercise their discretion improperly. This review ground is encapsulated as follows in the PAJA: ‘the action was materially influenced by an error of law’.<sup>79</sup> Given the review/appeal distinction (if somewhat tenuous today), the courts are guided in the interrogation of these errors by factors such as the nature of the power or function, and the materiality of the error. Thus, the courts will more readily review and set aside a decision on the basis of an error of law where the function in question is of a purely judicial nature (rather than say, a policy-laden or political nature), lacks a strong discretionary component, and was exercised pursuant to an error that is material or fundamental in nature.<sup>80</sup> Materiality rightly features as the touchstone in the enquiry and can be explained with reference to the ‘but for’ test: but for the error, the particular decision would not have been made thereby rendering the error material. Put differently, where the same outcome would have been reached, ‘even on a correct interpretation of the statutory criterion’,<sup>81</sup> the error of law could not have been material and so would not be reviewable on this basis.

The second overarching basis on which South African courts review administrative action for want of jurisdiction is that of ‘material mistake of fact’.<sup>82</sup> *Pepcor* affirmed this ground of review in administrative law—notwithstanding the PAJA’s failure to include it expressly—and has been hailed as a watershed case for this development:<sup>83</sup>

In my view a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should ... be reviewable at the suit of inter alios the functionary who made it—even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision.<sup>84</sup>

Courtesy of *Pepcor*, administrative decisions which are based on fundamentally flawed premises,<sup>85</sup> may be reviewed and set aside on this basis, notwithstanding the judicial assessment inevitably encroaching somewhat into the realm of the merits.

The more innocuous jurisdictional infractions typically manifest where an administrator fails to follow a prescribed procedure or makes a decision in breach

<sup>79</sup> *Ibid* at s 6(2)(d).

<sup>80</sup> These were the factors laid down in the seminal case of *Hira v Booyesen* 1992 (4) SA 69 (A) at 93–4.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA).

<sup>83</sup> See Hoexter (n 20) at 305 where she notes that, ‘for all its talk of the distinction between appeal and review, *Pepcor* represents a revolution in our administrative law’.

<sup>84</sup> *Ibid* para 47.

<sup>85</sup> See *Mabethu v MEC Social Development, Eastern Cape Government* [2006] ZAECHC 68 para 7, ‘[t] here can be no talk of a just administrative action if it is based upon a fundamentally wrong premise.’

of a substantive condition precedent, such as the formulation of an opinion<sup>86</sup> as to the existence of a certain state of affairs. In these instances, the legislation stipulates so-called 'jurisdictional facts' which must be present for the powers in question to be exercised lawfully. To this end, they are jurisdictional prerequisites: only if A is present, may the administrator do B. Where these are not met, administrators end up inflating their jurisdiction by accumulating further powers for themselves beyond that which the empowering legislation contemplates, and thereby acting unlawfully. Our case law is replete with examples of non-compliance with statutory prerequisites; particularly in the vexed context of procurement and the matter of tender conditions. Again, our courts have centred the enquiry on materiality:

The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.<sup>87</sup>

Suffice it to note that when it comes to scrutinising (non-)compliance with jurisdictional facts, such as a condition of tender, 'the materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained'.<sup>88</sup>

## (ii) Reasonableness

Reasonableness has enjoyed prominence as an independent ground of review in administrative law since the dawn of democracy. Under the Interim Constitution it manifested in a purportedly diluted form termed, 'justifiability', though in practice, this was largely accepted to be 'code for the broader notion of reasonableness'.<sup>89</sup> This 'broader' notion was given rightful recognition in section 33 of the Constitution which requires simply that administrative action be 'reasonable'. Despite this clear and express constitutional imprimatur, this ground remains a contentious basis for review. This is because it inevitably draws the courts into that awkward space between review and appeal by requiring some assessment of the merits of administrative decisions. In applying the reasonableness standard the courts thus have to fulfil the unenviable task of striking the right balance between ensuring proper judicial oversight and simultaneous respect for the separation of powers. The South

<sup>86</sup> Note that since *Walele v City of Cape Town* 2008 (6) SA 129 (CC) all of these 'subjective substantive jurisdictional facts' require an objective basis to be justifiable:

In the past, when reasonableness was not taken as a self-standing ground for review, the City's ipse dixit could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds. (para 60).

<sup>87</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) (*AllPay I*) para 28.

<sup>88</sup> *Ibid* para 22.

<sup>89</sup> Cora Hoexter 'The principle of legality in South African administrative law' (2004) 3 *Macquarie Law Journal* 165 at 172.

African courts have employed the concept of deference-as-respect,<sup>90</sup> with its twin notion of variability, which emphasises the need to let the context guide the degree of judicial scrutiny, to strike this delicate balance and cement the place of reasonableness review in our constitutional order.

It is by now fairly widely accepted in our jurisprudence that ‘rationality plus (at least) proportionality equals reasonableness’.<sup>91</sup> These concepts—despite overlapping and both flowing from the animating constitutional principle of accountability—are distinct and thus invoke different degrees of judicial scrutiny. It is perhaps for this reason that rationality is given expression separately in the PAJA, and lucidly and rather extensively so, despite being the so-called minimal constitutional threshold requirement. Rationality under the PAJA demands that administrative action be rationally connected to:

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator.<sup>92</sup>

Reasonableness, on the other hand, is rather clumsily and unhelpfully described in the PAJA,<sup>93</sup> but our courts have given careful expression to it through its proportionality component which essentially requires a balancing analysis aimed at determining whether the means chosen by an administrator *justify* the ends pursued, all things considered. The Court in *Bato Star* set out factors to guide the determination of what constitutes a reasonable decision in a given case:

[T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.<sup>94</sup>

Reasonableness arguably remains a controversial addition to the grounds of review in administrative law, but for what it is worth, this flexible review ground and its apparently less threatening counterpart of rationality increasingly serve as vital safeguards against the abuse of public power.<sup>95</sup>

<sup>90</sup> As endorsed by the Constitutional Court in *Bato Star* (n 22) para 46. For a recent critique of the notion of ‘deference’, see Clive Plasket ‘Judicial review, administrative power and deference: A view from the bench’ (2018) 135 *South African Law Journal* 502 and Malcolm Wallis ‘Do We Need Deference’ (2018) 1 *South African Judicial Education Journal* 97.

<sup>91</sup> Corder (n 7) at 443.

<sup>92</sup> Section 6(2)(f)(ii) of the PAJA (n 18).

<sup>93</sup> *Ibid* at s 6(2)(h) which gives a ‘court or tribunal ... the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.’

<sup>94</sup> *Bato Star* (n 22) para 45.

<sup>95</sup> We deal with this point in greater detail below at II.C.

(iii) *Procedural fairness*

Procedural fairness, much like reasonableness, places context at the heart of the enquiry: its prescripts are applied variably based on the facts of a case. This malleable ground of review in the ‘new South African administrative law’ in large part remains true to its age-old roots: it gives meaningful effect to the tenets of *audi alteram partem* (let the other side be heard) and *nemo iudex in sua causa* (the rule against bias). The PAJA gives expression to these tenets and develops them even further. Section 3(1) states that, ‘[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.’ Section 3(2)(a) in turn sets out the minimum requirements of procedural fairness under the PAJA which include:

- (a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal ... and
- (e) adequate notice of the right to request reasons in terms of section 5.

Section 3(3) contains a trio of discretionary ingredients which enhance the right to procedurally fair administrative action: (i) the right to legal representation ‘in serious or complex cases’,<sup>96</sup> (ii) the right to ‘present and dispute information and arguments’,<sup>97</sup> and (iii) the right to ‘appear in person’.<sup>98</sup> Perhaps the most noteworthy innovation of the PAJA is section 4 which pertains to ‘[a]dministrative action affecting the public’. It gives expression to the constitutional commitment to a form of participatory democracy premised on the values of ‘accountability, responsiveness and openness’.<sup>99</sup> Under section 4, whenever administrative action ‘materially and adversely affects the rights of the public’ an administrator must give effect to the right to procedurally fair administrative action by electing one of the following: holding a public inquiry;<sup>100</sup> following a notice and comment procedure;<sup>101</sup> employing a hybrid of the two;<sup>102</sup> following ‘a procedure which is fair but different’,<sup>103</sup> or alternatively, by adopting ‘another appropriate procedure’.<sup>104</sup> Importantly, the administrator’s choice in this regard, including a failure to decide, does not constitute administrative action under the Act’s cumbersome definition, and thus cannot be subject to judicial review.<sup>105</sup>

Another feature of this unfortunate definition worth highlighting is its anomalous failure to include a reference to legitimate expectations which, somewhat incongruously, nonetheless expressly invoke the requirements of procedural fairness

<sup>96</sup> Section 3(3)(a) of the PAJA (n 18).

<sup>97</sup> *Ibid* at s 3(3)(b).

<sup>98</sup> *Ibid* at s 3(3)(c).

<sup>99</sup> Section 1(d) of the Constitution (n 8).

<sup>100</sup> Section 4(1)(a) of the PAJA (n 18).

<sup>101</sup> *Ibid* at s 4(1)(b).

<sup>102</sup> *Ibid* at s 4(1)(c).

<sup>103</sup> *Ibid* at s 4(1)(d).

<sup>104</sup> *Ibid* at s 4(1)(e).

<sup>105</sup> *Ibid* at s 1(i)(ii).



under section 3. Our courts have read-down this legislative anomaly, employing the standard interpretive technique of letting the specific inform the general. Thus in *Walele* the Court held that notwithstanding the deficit of the section 1 definition in this regard, it should nonetheless be assumed that, '[section] 3 of PAJA confers the right to procedural fairness also on persons whose legitimate expectations are materially and adversely affected by an administrative decision ... [for] applying the definition to [section] 3 would lead to an incongruity or absurdity not intended by Parliament'.<sup>106</sup> The doctrine thus continues to be an important aspect of natural justice under the Act as informed by the 'well-established principles' of the common law.

On the subject of these principles, the doctrine of legitimate expectation is an English law import that gained prominence in South African law following the 1989 benchmark judgment of Corbett CJ in *Traub*.<sup>107</sup> Broadly speaking, it may be applied whenever a person enjoys a privilege or benefit and stands to suffer an injustice if that privilege or benefit is denied in the absence of a hearing. Such an expectation may arise from reasonable reliance on a promise made by a decision-maker and/or a regular practice which is reasonably expected to continue, and/or from other equivalent administrative conduct, and while the expectation itself may have both a procedural and an interrelated substantive component,<sup>108</sup> the relief afforded by the doctrine in South African administrative law remains within the bounds of procedure;<sup>109</sup> namely a fair hearing by an impartial decision-maker. In this sense, we have not kept pace with developments in England where the courts have moved 'from tentative recognition of the possibility of substantive protection to full acceptance of the idea'.<sup>110</sup> Hoexter has remarked that *KZN Joint Liaison Committee*,<sup>111</sup> could well 'have been the case to introduce this device into our law', but instead what emerges from it is an apparent additional pathway to review.

<sup>106</sup> *Walele* (n 86) para 37.

<sup>107</sup> *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

<sup>108</sup> See *Walele* (n 86) paras 35–7, for a useful exposition of the doctrine in South African law.

The case of *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) para 28 also provides a clear (if more restrictive) exposition of the requirements to found a legitimate expectation:

The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following: (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification' ... (ii) The expectation must be reasonable ... (iii) The representation must have been induced by the decision-maker; and (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.

<sup>109</sup> See Hoexter (n 20) at 426–436.

<sup>110</sup> *Ibid* at 427.

<sup>111</sup> *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal* 2013 (4) SA 262 (CC).

#### 4. UNCONSCIONABLE CONDUCT WHEN MEASURED AGAINST THE CONSTITUTIONAL STANDARDS OF RELIANCE, ACCOUNTABILITY AND RATIONALITY

A full analysis of the intriguing set of judgments in *KZN Joint Liaison Committee* is beyond the scope of this chapter; however the ultimate effect of this case deserves some attention insofar as it has seemingly led to the development of yet another pathway to review and public-law cause of action; namely, ‘the constitutional principle of unconscionable state conduct that is in breach of reliance, accountability and rationality’.<sup>112</sup> The case of *KZN* concerned a unilateral decision by the KZN provincial department of education to reduce school subsidies to independent schools with retrospective effect, and after the date for payment of the first tranche of subsidies had already passed.<sup>113</sup> The applicant failed to frame the cause of action as a breach of administrative justice and focused (if unadvisedly) instead on the purported contractual nature of the promise,<sup>114</sup> and the *amicus curiae* made compelling submissions for founding a legitimate expectation (given both a promise and a past practice in relation to the subsidy payment)<sup>115</sup> which could conceivably have provided the court with the impetus to recognise the protection of substantive expectations. Yet, the Court saw fit to throw the applicant a different kind of ‘public-law lifeline’<sup>116</sup>—one *not* based on a breach of the administrative justice right, nor on what Cameron J recognised as an enforceable ‘bilateral agreement’,<sup>117</sup> but rather a lifeline founded on ‘broader public law and regulatory grounds’.<sup>118</sup> Buttressed by the constitutional right to basic education (in section 29), the majority held that, ‘[i]t seems both legally and constitutionally unconscionable that, more than a month after the first tranche of the promised subsidy had already fallen due under the national Norms and the provincial regulation, the Department should peremptorily reduce it’.<sup>119</sup>

The ‘unconscionability’ in the circumstances could be attributed to the standards of ‘reliance, accountability and rationality’.<sup>120</sup> First, the schools had budgeted for a whole year in reliance on the notice and could not adjust their future outlays in relation to the tranche that had already fallen due.<sup>121</sup> Second, constitutional accountability and responsiveness demand that government decisions which impact those to whom undertakings have already been made, be announced expeditiously.<sup>122</sup> Third, government officials must act rationally in dealing with

<sup>112</sup> *Pretorius and Another v Transport Pension Fund* 2019 (2) SA 37 (CC) para 39.

<sup>113</sup> *KwaZulu-Natal Joint Liaison Committee* (n 111) para 62.

<sup>114</sup> *Ibid* para 58.

<sup>115</sup> *Ibid* para 27.

<sup>116</sup> Cora Hoexter ‘The Enforcement of an Official Promise: Form, Substance and the Constitutional Court’ (2015) 132 *South African Law Journal* 207 at 219.

<sup>117</sup> *KwaZulu-Natal Joint Liaison Committee* (n 111) para 58.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid* para 63.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid* para 64.

those who act in reliance on their undertakings and '[r]evoking a promise when the time for its fulfilment has already expired does not constitute rational treatment of those affected by it.'<sup>123</sup> The applicant was therefore able to establish an entitlement to actual payment of the subsidy undertaking set out in the 2008 notice up to 1 April 2009.<sup>124</sup>

The application of the standards of reliance, accountability and 'reliance-based rationality'<sup>125</sup> to the factual matrix in *KZN*, considered in light of the fact that 'there could be no overriding public interest in the *ex post facto* retraction of the promise',<sup>126</sup> essentially birthed a new pathway to review and cause of action in our system of public law. This has subsequently been endorsed as such in *Pretorius*,<sup>127</sup> where the Constitutional Court recognised *KZN Joint Liaison Committee* as 'authority for the proposition that a separate claim may lie, based on the same conduct, even though that conduct might also amount to administrative action under PAJA'.<sup>128</sup> In *Pretorius*, the applicants' claim of unconscionable state conduct (when measured against the standards of reliance, accountability and rationality), was similarly buttressed with reference to a constitutional right; namely the right to social security under section 27(1)(c), and the 'special legislative protection of pensioners'.<sup>129</sup> The Court held that, '[t]he appeal against the upholding of the exception against the unlawful state action claim must ... succeed' despite noting the dangers of our proliferating pathways to review and the knock-on effect on the principle of subsidiarity and concomitantly increasing invisibility of the PAJA.<sup>130</sup> This new cause of action has however been embraced by litigants and was raised head-on in the context of a failure to build a promised school in the case of *Mpungose Traditional Council*,<sup>131</sup> under the heading, 'the decision was an unconscionable breach of promise'.<sup>132</sup> The court summarised the principle thus: 'a promise, seriously and lawfully made by a public official, may be enforceable at public law by those to whom it was made if it would be '... both legally and constitutionally unconscionable ...' for the public official to renege on the promise'.<sup>133</sup>

## 5. DIRECT RELIANCE ON SECTION 33 OF THE CONSTITUTION

Despite the current judicial trend to propagate pathways, our courts have previously reaffirmed on numerous occasions that, '[w]hen the legislature enacted the PAJA, it sought to codify extensively [the] grounds of review'.<sup>134</sup> Applications for

<sup>123</sup> *Ibid* para 65.

<sup>124</sup> *Ibid* para 69.

<sup>125</sup> Hoexter (n 116) at 201.

<sup>126</sup> *KwaZulu-Natal Joint Liaison Committee* (n 111) para 66.

<sup>127</sup> *Pretorius* (n 112).

<sup>128</sup> *Ibid* para 36.

<sup>129</sup> *Ibid* para 39.

<sup>130</sup> *Ibid* paras 45 and 37.

<sup>131</sup> *Mpungose Traditional Council v MEC for Education, KZN Province* [2019] 3 All SA 817 (KZP).

<sup>132</sup> *Ibid* para 121.

<sup>133</sup> *Ibid* para 127.

<sup>134</sup> *Walele* (n 108) para 29.

review of administrative action must thus 'ordinarily be based on the PAJA',<sup>135</sup> which is the primary pathway to review, in line with the constitutional principle of subsidiarity and its related principle of avoidance.<sup>136</sup> Direct review under section 33 is, as a result, meant to be<sup>137</sup> available only in limited instances. The possibilities for legitimate direct review are as follows. First, while the PAJA serves as the sword that enables citizens to hold the administration to account, section 33 'acts as a shield against laws, policies and practices that undermine administrative justice'.<sup>138</sup> Thus, in *Zondi*,<sup>139</sup> the Constitutional Court tested the validity of the provisions of the Pound Ordinance<sup>140</sup> directly against section 33 given that, when legislation is challenged on the basis of a conflict with the administrative justice right, that right itself must be the benchmark against which the conflict is assessed, not the PAJA.<sup>141</sup>

Second, section 33 plays an animating role in informing the interpretation of the PAJA and keeping it within constitutional bounds. Last, direct recourse may be had to section 33 to challenge the constitutionality of the PAJA itself—a challenge that was predicted to eventuate given, for example, the severe curtailment of the scope of administrative action under the Act, though today it seems unlikely given that so much water has flowed under the PAJA bridge and led to the emergence of other more user-friendly roadways to review. On this note, despite the theoretical simplicity of this threefold function of section 33 (when invoked directly), the case law reveals a frequently misplaced reliance on the section.<sup>142</sup> This appears to stem in large part from the complexity of the conceptual hurdles in the PAJA (notably the definition of administrative action) which the courts (and litigants) tend to bypass in favour of direct recourse to section 33, the common law, the flexible *supra* constitutional 'principle of legality and rationality',<sup>143</sup> and now the constitutional principle of unconscionable state conduct as espoused in *KZN Joint Liaison Committee*.<sup>144</sup>

<sup>135</sup> *Ibid.*

<sup>136</sup> This latter principle was first enunciated in *S v Mhlungu* 1995 (3) SA 867 (CC) para 59, 'where it is possible to decide any case ... without reaching a constitutional issue, that is the course that should be followed'; hence norms of greater specificity set out in legislation or the common law, should be resorted to before direct reliance is placed on a constitutional provision.

<sup>137</sup> We say this given the judicial tendency to avoid the PAJA and rely directly on either s 33 or the principle of legality in instances. Ngcobo J is notorious for doing this side-stepping. See, for example, Hoexter (n 116) at 221.

<sup>138</sup> *Plasket* (n 5) at 31.

<sup>139</sup> *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC).

<sup>140</sup> The Pound Ordinance 32 of 1947.

<sup>141</sup> *Ibid* para 99.

<sup>142</sup> For example, in *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (Tk) para 12—a case which concerned disciplinary decisions taken by a political party against the applicants—Jafta JJP reasoned that, 'it is unnecessary for me to express any opinion on whether the provisions of s 3 of PAJA apply to the present case ... In my view, the matter can be disposed of sufficiently by having recourse to the provisions of s 33 of the Constitution ...'.

<sup>143</sup> *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 42 and 77–8.

<sup>144</sup> See Hoexter (n 116) at 223 where she notes that this judgment 'may be somewhat subversive of the PAJA'.

## 6. THE CONSTITUTIONAL PRINCIPLE OF LEGALITY-CUM-RATIONALITY

Review under the PAJA and section 33 are confined to those exercises of public power that amount to administrative action. The limiting and troublesome definition of this concept in the PAJA excludes from review many instances of public power which have hitherto been reviewable under the common law. The principle of legality, an aspect of the founding constitutional value of the rule of law,<sup>145</sup> emerged in response to this. Despite its pre-eminence in our constitutional order, this principle is a venerable concept which originated in the royal prerogative. It is thus familiar to South African administrative law. Its function today is primarily that of constitutional safety net to enable the review of the exercise of public power—typically in the form of executive action—that falls outside the relatively narrow realm of ‘administrative action’ under the PAJA.

This broader approach to the review of the exercise of public power, using the supple principle of legality and particularly its requirement of rationality, has burgeoned to accommodate the PAJA’s deficit and to address state excesses more generally. In this latter respect, it has proven to be an invaluable device to curb the corruption endemic in South Africa. Following a string of judgments handed down by the Constitutional Court and Supreme Court of Appeal, the principle now covers all the quintessential administrative law review grounds to some extent,<sup>146</sup> and has thus been dubbed, ‘administrative law by another name’.<sup>147</sup> A full discussion of the dangers flowing from this otherwise positive development is beyond the scope of this Chapter.<sup>148</sup> Suffice it to note that it has had the consequence of side-lining the PAJA, robbing judicial review of predictable structure, and placing extensive power in judicial hands; often in a manner worrisome from a separation-of-powers perspective.

The temptation of legality’s suppleness and more forgiving procedural requirements,<sup>149</sup> has also had the disconcerting and disingenuous practical result of enabling organs of state to rest on their laurels and then invoke legality to review their own decisions (seemingly when they no longer suit) without being hit by the PAJA’s restrictive time-bar provisions. This is epitomised by the notorious case of *Gijima*,<sup>150</sup> which has been alluded to above, and pursuant to which we now have an additional doorway to legality review, but now bizarrely for administrative action proper when challenged by the organ of state which took it.

In a curious piece of judicial reasoning, the Constitutional Court held that, ‘no choice is available to an organ of state wanting to have its own decision reviewed; PAJA is simply not available to it’ and instead the principle of legality is in such

<sup>145</sup>Section 1(c) of the Constitution (n 8).

<sup>146</sup>See Lauren Kohn ‘The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?’ (2013) 130 *SALJ* 802.

<sup>147</sup>Clive Plasket *The fundamental right to just administrative action: Judicial review of administrative action in the democratic South Africa* (unpublished PhD thesis, Rhodes University, 2002) at 164.

<sup>148</sup>See Kohn (n 146).

<sup>149</sup>Hoexter (n 116) at 121.

<sup>150</sup>*Gijima* (n 24).

instances, the order of the day.<sup>151</sup> This case has been the subject of vociferous academic criticism<sup>152</sup> and indeed, some members of the Constitutional Court bench are themselves *ex post facto* doubting its correctness.<sup>153</sup> For us, the most disconcerting aspect of the judgment (which rests, as it does, on a narrow and dated approach to constitutional rights entirely out of step with the actual wording of section 38 of the Constitution and the Court's own jurisprudence) is that it creates the following anomaly: if action A (administrative action as defined) is reviewed by an affected party other than the organ of state that took it, it is subject to the stricter procedural requirements of the PAJA and the Act's more searching substantive review grounds. But if the same action A is the subject of *Gijimaesque* self 'state review', it will be subjected to an overall lower standard of substantive scrutiny<sup>154</sup> and looser procedural requirements. In other words, the outcome in these cases—both flowing from a challenge to the same action A—depends on the identity of the party bringing the review. This nonsensical result of *Gijima* in turn adds to the uncertainty and unpredictability of our administrative law with its idiosyncratic profusion of pathways, causes of action and variable grounds of review depending on how the claim is couched.

We have yet to see how the courts are going to grapple with this anomaly and the divergent standards in the context of state self-review under legality. For present purposes we thus highlight briefly several key cases in which legality-cum-rationality review proper (as the backstop for reviewing public power outside the ambit of administrative action) has been invoked to apply the prescripts of lawfulness, rationality, procedural fairness (or 'procedural rationality'<sup>155</sup>) and the duty to give reasons, to non-'administrative action'.

<sup>151</sup>Ibid paras 37–38.

<sup>152</sup>See for example, Mitchell de Beer 'A new role for the Principle of Legality in Administrative Law' (2018) 135 *South African Law Journal* 613, Leo Boonzaier 'A decision to Undo' (2018) 135 *South African Law Journal* 642, and Geo Quinot & Elsabe van der Sijde 'Opening at the close: Clarity from the constitutional court on the legal cause of action and regulatory framework for an organ of state seeking to review its own decisions?' (2019) *Tydskrif vir die Suid-Afrikaanse Reg* 324.

<sup>153</sup>See the dissent in *Buffalo City* (n 37) para 112 where Cameron and Froneman JJ note that, 'The reasoning this Court advanced in *Gijima* for choosing legality as the appropriate pathway for state institutions' self-review has not found universal favour. While its treatment of standing and delay has been the immediate target of this criticism, *Gijima* is also accused of aggravating the bifurcation or 'parallelism' in our administrative law between PAJA review as opposed to legality review. This has been a persisting source of academic concern. It may in due course become necessary to reconsider whether the legality review pathway chosen in *Gijima* withstands the test of time. Now is not that time.'

<sup>154</sup>Hoexter (n 116) at 220 rightly notes that the content of legality 'in a particular case is not nearly as fixed or certain as that of the PAJA. The more basic requirements of legality and rationality apply across the board, but it may not be so easy to predict when the more advanced requirements of procedural fairness and reason-giving will apply.'

<sup>155</sup>This term, 'constitutionally-inspired procedural rationality principle', has emerged in more recent case law. See for example, *Electronic Media Network Limited v e.tv (Pty) Limited* 2017 (9) BCLR 1108 (CC) para 66.

**(a) Legality and rationality**

At the heart of the principle of legality is the requirement of lawfulness, developed through three earlier cases of great importance. First came *Fedsure*, which dealt with the power of a local authority to make budgetary resolutions, and in which the Constitutional Court emphasised that, ‘the exercise of public power is only legitimate where lawful’.<sup>156</sup> A year later, in the second case in the seminal trio,<sup>157</sup> the *SARFU* judgment, the Constitutional Court subjected President Mandela’s decision to appoint a commission of inquiry under section 84(2)(f) of the Constitution, to review, under the principle of legality on the basis of lawfulness. In particular, the court held that, ‘as is implicit in the Constitution, the President must act in good faith and must not misconstrue [his] powers’. The last instalment in the trio introduced the requirement of *rationality*—the purportedly most minimally invasive constitutional constraint and an aspect of the broader notion of reasonableness. In *Pharmaceutical Manufacturers*,<sup>158</sup> President Mandela, acting in good faith, on the mistaken counsel of officials in the Department of Health, had brought an Act into force in the absence of the requisite subordinate legislation. The Constitutional Court found this decision to be irrational in the circumstances since the President, ‘through no fault of his own’, failed to exercise the public power in question ‘in an objectively rational manner’.<sup>159</sup> The Court laid the foundations for rationality review under the principle of legality by formulating the requirement as follows:

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.<sup>160</sup>

This ‘minimum threshold requirement’<sup>161</sup> has in subsequent cases been stretched<sup>162</sup> to necessitate a more searching analysis akin to full-blown proportionality, notwithstanding judicial insistence that it remains mere rationality and thus does not offend the separation of powers. The significant Constitutional Court judgment of *Democratic Alliance v President of the Republic of South Africa*<sup>163</sup> illustrates this development. This case brought a close to the controversial sequence of events surrounding the forced resignation of Mr Pikoli from his office as National Director of Public Prosecutions (NDPP) and President Zuma’s appointment of Mr Simelane in his stead, despite the latter’s background which strongly pointed to his lack of fitness for the office. The Court, in reviewing this decision under the principle of

<sup>156</sup> *Fedsure* (n 38) para 56.

<sup>157</sup> See the discussion at A above.

<sup>158</sup> *Pharmaceutical Manufacturers* (n 2).

<sup>159</sup> *Ibid* para 89.

<sup>160</sup> *Ibid* para 85.

<sup>161</sup> *Ibid* para 90.

<sup>162</sup> Kohn (n 146).

<sup>163</sup> (122/11) [2012] ZACC 24.

legality, found it to be plainly irrational and thus set it aside.<sup>164</sup> In doing so, the Court developed the rationality requirement to cover rationality in process as well as outcome,<sup>165</sup> thereby indirectly affirming the unavoidable substantive ingredient to review under the Constitution and planting the seed for what has now come to be known as ‘procedural rationality’:

The decision of the President as Head of the National Executive can be successfully challenged [even if] only ... a *step* in the process [as a whole] bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the *process as a whole* and hence the ultimate decision with irrationality.<sup>166</sup>

### **(b) Procedural fairness**

*Albutt v Centre for the Study of Violence and Reconciliation*,<sup>167</sup> established natural justice and in particular, its *audi* requirement as part of the principle of legality, but only strictly in relation to the *particular* exercise of public power in question. This case concerned an executive decision of President Mbeki who, acting under section 84(2)(j) of the Constitution, sought to introduce a special dispensation to enable political prisoners to apply for a presidential pardon. The dispensation was aimed at addressing the ‘unfinished business’<sup>168</sup> of the Truth and Reconciliation Commission (TRC) but despite its apparently laudable aims, none of the relevant documentation made reference to the victims of the crimes and in particular their right to be heard in the process.<sup>169</sup> The Constitutional Court thus had to decide whether the tenets of procedural fairness applied and, if so, whether they had been breached. Building on the foundations laid in his judgment in *Masethla*,<sup>170</sup> as well as the findings in *Chonco*,<sup>171</sup> Ngcobo CJ held this to be the case, although he strictly, and explicitly, limited *audi* as an element of rationality to the unique circumstances in question:<sup>172</sup>

[T]he requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features ... and its objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.<sup>173</sup>

<sup>164</sup> *Ibid* paras 86–9 and 95.

<sup>165</sup> *Ibid* para 34.

<sup>166</sup> *Ibid* para 37. Emphasis added.

<sup>167</sup> 2010 (3) SA 293 (CC).

<sup>168</sup> *Ibid* para 4.

<sup>169</sup> *Ibid* para 7.

<sup>170</sup> *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC).

<sup>171</sup> *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) para 30, where the court held that the President’s power to confer pardons ‘entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay’.

<sup>172</sup> *Albutt* (n 167) paras 75–6.

<sup>173</sup> *Ibid* para 72.



### (c) *The duty to give reasons*

In *Judicial Service Commission v The Cape Bar Council*,<sup>174</sup> the Supreme Court of Appeal had to answer the question whether the rationality requirement under the principle of legality entails a general duty to give reasons. This question arose pursuant to the JSC's refusal to produce reasons for its decision not to recommend any of the qualified candidates for appointment to outstanding vacancies on the bench of the Western Cape High Court, despite the fact that the shortlisted candidates were strongly supported by the General Council of the Bar on the basis that they were 'fit and proper' as contemplated by section 174(1) of the Constitution.<sup>175</sup> In a strongly worded unanimous judgment the court answered this question in the affirmative and thereby established the duty to give reasons in respect of non-administrative action. It held that 'the JSC's power to advise the President on the appointment of judges of the High Court is derived from s 174(6) of the Constitution [and] ... is [thus] undoubtedly a public power'<sup>176</sup> which must be exercised rationally and in accordance with the constitutional values of transparency and accountability.<sup>177</sup> As such, the court held that, 'as a matter of general principle'<sup>178</sup> the JSC is 'obliged to give reasons' in deciding 'whether or not to recommend candidates for judicial appointment'.<sup>179</sup>

In the spirit of our constitutional commitment to accountability, responsiveness and openness, this general approach has recently been taken even further. In *Helen Suzman Foundation v Judicial Service Commission*,<sup>180</sup> the Constitutional Court, in a strongly worded judgment that pays heed to the vital role of an independent judiciary within a constitutional democracy,<sup>181</sup> held that the JSC was bound to provide an applicant seeking to review its actions with a full transcription of its private deliberations as part of the 'record' required to be disclosed under Rule 53 of the Uniform Rules of Court which governs applications for review. The court noted that, '[t]he JSC's own practice of distilling reasons for a decision from the deliberations is indication enough that JSC deliberations are of relevance to the decisions. They clearly bear on the lawfulness, rationality and procedural fairness of the decisions'.<sup>182</sup>

### (d) *Special statutory review*

Although the PAJA is the generally applicable legislative standard, Parliament has seen fit to enact specific laws in an array of fields (such as competition,<sup>183</sup> consumer

<sup>174</sup> (818/11) [2012] ZASCA 115.

<sup>175</sup> *Ibid* at para 37–9; this was accepted as common cause between the parties.

<sup>176</sup> *Ibid* at para 22.

<sup>177</sup> *Ibid* at para 43.

<sup>178</sup> *Ibid* at para 51.

<sup>179</sup> *Ibid* at para 51.

<sup>180</sup> [2018] ZACC 8.

<sup>181</sup> *Ibid* paras 32–34.

<sup>182</sup> *Ibid* para 24.

<sup>183</sup> The Competition Act 89 of 1998 provides for the establishment of a Competition Commission, *inter alia*, to investigate and control restrictive practices, abuse of dominance etc, as well as a Competition Tribunal and a Competition Appeal Court to hear appeals from the Tribunal and review its decisions.

protection,<sup>184</sup> and labour relations<sup>185</sup> ) which provide for analogous review regimes in relation to particular matters which might otherwise invoke the requirements of administrative justice under the PAJA. In such instances, special statutory review operates as a fourth pathway to review either alongside the PAJA<sup>186</sup> or, as is ordinarily the case, to its exclusion. An obvious example of the latter is the review of decisions of information officers under the PAIA which are explicitly excluded from the realm of administrative action.<sup>187</sup> A less obvious, and indeed more controversial example, arises in the employment context. Section 23 of the Constitution provides for rights in regard to 'labour relations', which are given detailed effect through the specialised legislative framework created by LRA,<sup>188</sup> which in turn incorporates administrative law principles such as the tenets of procedural fairness. The LRA and the PAJA have seemingly not been able to coexist comfortably in the public realm: '[t]he characterisation of powers exercised by a public entity in its employment relations has been hotly debated in South Africa'.<sup>189</sup> This is because the courts have been distracted by the jurisdictional question that has repeatedly arisen in this context: can these pathways be pursued as alternatives to obtain relief, or must the specific legislation, based on the relevant constitutional right, regulate the matter to the exclusion of the PAJA? This question arises because employment decisions (such as dismissals) in the public sector tend to implicate not only labour rights but also those of administrative justice.

The Constitutional Court seemed to have resolved this debate in the case of *Chirwa v Transnet Ltd*,<sup>190</sup> which concerned a challenge framed on administrative law grounds to a dismissal in the public sector. The Court was at pains to distinguish<sup>191</sup> the facts of the case from its predecessor, *Fredericks v MEC for Education and Training, Eastern Cape*<sup>192</sup> notwithstanding the fact that the issue in question was clearly analogous.<sup>193</sup> In *Chirwa*, the court framed the 'central question' as follows:

<sup>184</sup>Section 85 of the Consumer Protection Act 68 of 2008 establishes a National Consumer Commission as the specialised administrative tribunal tasked with, *inter alia*, ensuring compliance and enforcement under the Act.

<sup>185</sup>The Labour Relations Act 66 of 1995 ('LRA') created: the Commission for Conciliation, Mediation and Arbitration ('CCMA') to resolve labour disputes and perform various administrative and adjudicative functions; the Labour Court and the Labour Appeal Court, and thereby established a comprehensive regulatory regime in the sphere of labour relations.

<sup>186</sup>See *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC), which pertains to s 145 of the LRA, and Hoexter's (n 20) analysis of this case at 121 where she notes that *Sidumo*-type review, which operates 'alongside the PAJA ... is not limited to the specific grounds listed in the relevant statute ... [but rather] full-scale administrative review is applied irrespective of the limits of the grounds themselves'.

<sup>187</sup>Section 1(i)(hh) of the PAJA (n 18).

<sup>188</sup>The LRA (n 185).

<sup>189</sup>Hoexter (n 20) at 210.

<sup>190</sup>2008 (4) SA 367.

<sup>191</sup>*Ibid* para 58.

<sup>192</sup>2002 (2) SA 693 (CC).

<sup>193</sup>The court in *Fredericks*, para 40, held that, 'there is no general jurisdiction afforded to the Labour Court in employment matters, [thus] the jurisdiction of the High Court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of labour relations.'

‘whether Parliament conferred the jurisdiction to determine the applicant’s case upon the Labour Court and the other mechanisms established by the LRA, in such a manner that it ... exclude[s] the jurisdiction of the High Court’<sup>194</sup> and thereby, in addition, excludes relief on administrative law grounds. The Court held this to be the case, despite the fact that Ms Chirwa founded her cause of action solely in administrative law. Essentially, the court reasoned that the LRA is the ‘pre-eminent legislation in labour matters’<sup>195</sup> and creates a ‘one-stop-shop’ for all labour-related disputes through an integrated system of specialised dispute resolution mechanisms, forums and remedies. Furthermore, by virtue of section 157(1), where exclusive jurisdiction over a matter is conferred upon the Labour Court by the LRA, the jurisdiction of the High Court is ousted.<sup>196</sup> Ms Chirwa was therefore not allowed to pursue her case on administrative law grounds, for to do so would ‘relegate the finely-tuned dispute resolution structures created by the LRA’<sup>197</sup> which would in turn lead to the creation of a ‘dual system of law’.<sup>198</sup> This would have the undesirable knock-on effect of encouraging forum-shopping and giving public-sector employees an unfair advantage over those in the private sector.<sup>199</sup>

This decision was met with strongly expressed criticism<sup>200</sup> which continued until the Constitutional Court put a gloss on *Chirwa’s* finding in *Gcaba v Minister for Safety and Security*.<sup>201</sup> In essence, the Court in *Gcaba* affirmed that the system of special statutory review under the LRA applies to the exclusion of the PAJA, *unless* the conduct in question has a broad public impact and can thus be said to amount to administrative action. Put differently:

Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.<sup>202</sup>

The default position in South African law is thus that the existence of a system of special statutory review operates to the exclusion of review under the PAJA, save where the offending conduct clearly constitutes administrative action—as in the *Sidumo*-type situation<sup>203</sup> or where the labour-related conduct has a ‘public impact’—in which case the applicant can ground his or her cause of action in either regime.<sup>204</sup>

<sup>194</sup> *Chirwa* (n 190) para 20.

<sup>195</sup> *Ibid* para 50.

<sup>196</sup> *Ibid* para 59.

<sup>197</sup> *Ibid* para 65.

<sup>198</sup> *Ibid*.

<sup>199</sup> *Ibid* para 66.

<sup>200</sup> See for example, Cora Hoexter ‘Clearing the intersection? Administrative law and labour law in the Constitutional Court’ (2008) 1 *Constitutional Court Review* 209 and Halton Cheadle ‘Deconstructing *Chirwa v Transnet*’ (2009) 30 *Industrial Law Journal* 741.

<sup>201</sup> 2010 (1) SA 238 (CC).

<sup>202</sup> *Ibid* para 64.

<sup>203</sup> In *Sidumo* (n 186) the court concluded that the CCMA was engaged in administrative action and thus subject to judicial review.

<sup>204</sup> Hoexter (n 20) at 120.

**(e) The common law**

In *Pharmaceutical Manufacturers*, the Constitutional Court pronounced that, '[t] here are not two systems of law ... [but] only one ... [which] is shaped by the Constitution ... and all law, including the common law, derives its force from the Constitution and is subject to constitutional control'.<sup>205</sup> Since the advent of democracy and the enactment of our comprehensive Bill of Rights, especially section 33, the common law is thus no longer the mainspring of administrative law: it does not have to do quite so much work. However, it certainly lives on and in fact continues to play a fairly extensive role in our system of administrative justice. This role is essentially fivefold.<sup>206</sup>

The first role is that which was originally intended for it: an interpretive, informative and supplementary role to guide the interpretation of the PAJA and section 33. In *Manong*,<sup>207</sup> the High Court highlighted the importance of this role, stating that many of the concepts used in the PAJA, 'require recourse to common-law jurisprudence' in order to give meaning to them.<sup>208</sup> The case of *Premier of Mpumalanga*<sup>209</sup> provides a useful example. The Constitutional Court interpreted the concept of legitimate expectation as used in section 24 of the Interim Constitution, by drawing on the rich common-law jurisprudence on the subject. Second, particularly given the loopholes in section 6(2) of the PAJA, the common law plays a gap-filling role in respect of certain well-established grounds of review that have been omitted from the Act. Thus, for example, the grounds of vagueness, abdication and the no-fettering rule (also known as 'rigidity')—all well-known at common law—continue to find direct application through section 6(2)(i) (the 'catch-all ground'), which also serves to enable further developments of the common law that can be fed into the PAJA.

Third, the common law mitigates the harshness of certain provisions of the PAJA—such as the section 7 duties to institute judicial review proceedings within 180 days and to exhaust internal remedies, respectively—which are *prima facie* out of step with constitutional values and the more nuanced common-law principles. Fourth, the common law provides a contextual backdrop against which new grounds of review (such as reasonableness) that were not directly available at common law, can be interpreted and developed.<sup>210</sup> Finally, the common law

<sup>205</sup> *Pharmaceutical Manufacturers* (n 2) para 44.

<sup>206</sup> Lauren Kohn 'Our curious administrative law love triangle: The complex interplay between the PAJA, the Constitution and the common law' (2013) 28 *SA Public Law* 22 at 35.

<sup>207</sup> *Manong and Associates v Director-General: Department of Public Works* 2005 (10) BCLR 1017 (C).

<sup>208</sup> *Ibid* at 1026H–1027A.

<sup>209</sup> *Premier of Mpumalanga v Executive Committee of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 (CC).

<sup>210</sup> See for example *Bato Star* (n 22) para 44 where O'Regan J drew from the English common law in giving meaning to s 6(2)(h) of PAJA. She referred to Lord Cooke's insights on unreasonableness in the case of *R v Chief Constable of Sussex, Ex Parte International Trader's Ferry Ltd* [1999] 1 All ER 129 (HL) 157, and held that, '[s]ection 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.'

continues to play an independent review role in cases not covered by the PAJA or by the Constitution more generally.<sup>211</sup> For example, in relation to the reviewability of private power (particularly in a disciplinary setting) exercised by private voluntary associations such as religious bodies and sporting clubs, the common law has remained a pathway to judicial review to the extent that the PAJA's formulation of administrative action may exclude such conduct. Thus, the principles of natural justice which emerged in this context in the string of Jockey-Club-type cases<sup>212</sup> continue to find direct application in similar circumstances via the common law. Note however, that the *Ndoro* case suggests that even in such cases of strictly private bodies exercising formally private powers, these powers may nonetheless be subject to full-blown PAJA-review where their exercise, as a matter of substance in the circumstances, strives after public objects.<sup>213</sup>

### (f) Remedies

Section 8 of the PAJA provides specifically for '[r]emedies in proceedings for judicial review' and section 8(1) in turn empowers a court in review proceedings to 'grant any order that is just and equitable' which mirrors the wide constitutional remedial discretion in section 172(1)(b) of the Constitution. Section 8 then lists (non-exhaustively) different remedial orders that a review court may award within the reach of so-called justice and equity, including the archetypal common-law remedies: (i) setting aside<sup>214</sup> (pursuant to which the decision in question is declared invalid by the court and this finding operates retrospectively in accordance with the doctrine of objective constitutional invalidity,<sup>215</sup> save where the court directs otherwise) and (ii) correcting<sup>216</sup> (which operates as the exception rather than the rule in accordance with the separation of powers). Setting aside is a fundamental remedy that flows from the rule of law in terms of which unlawful administrative action must be declared invalid.<sup>217</sup> It may be the most straightforward remedy, but, in accordance with the dictates of justice and equity, it still has a discretionary component. As the Supreme Court of Appeal emphasised in *Oudekraal*:<sup>218</sup>

[A] court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or withhold the remedy. It is this discretion

<sup>211</sup> Hoexter (n 20) at 253.

<sup>212</sup> See for example, *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) and *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T).

<sup>213</sup> *Ndoro* (n 26) paras 28–30.

<sup>214</sup> Section 8(1)(c) of the PAJA (n 18).

<sup>215</sup> *Ferreira v Levin* NO 1996 (1) SA 984 (CC) para 27 where the court explained that where a decision is set aside as being invalid, the invalidity operates with retrospective effect.

<sup>216</sup> *Ibid* at s 8(1)(c)(ii)(aa) which allows the court to grant an order 'in exceptional cases' aimed at 'substituting or varying the administrative action or correcting a defect result from the administrative action.'

<sup>217</sup> This in turn flows from the supremacy of the Constitution (s 2,) read with s 172(1)(a) in terms of which a reviewing court 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. See also *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 84.

<sup>218</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.<sup>219</sup>

This discretionary ‘moderating tool’ was innovatively applied<sup>220</sup> by the Supreme Court of Appeal in *Millennium Waste*,<sup>221</sup> in which the court held a consortium’s tender for medical waste removal services to be invalid on the basis that it was “‘materially influenced by an error of law” contemplated in s 6(2)(d) of PAJA’.<sup>222</sup> Despite this finding, in exercising its discretionary power in granting just and equitable relief, the court did not set aside the impugned tender for to do so would have adverse consequences for the public purse.<sup>223</sup> Furthermore, the termination of the tender contract would disrupt the delivery of the important public service of ensuring safe and expeditious removal of medical waste from public hospitals.<sup>224</sup> The Court solved this dilemma by granting a remedy aimed at striking the right balance between the competing interests of the parties and the public at large: it directed the tender board to re-evaluate both the consortium’s and Millennium Waste’s tenders relative to one another by a particular date in order to determine ‘which tender ought properly to have been accepted’.<sup>225</sup> If indeed it should have been the latter’s, then further orders of the court would issue including, at that stage, the setting aside of the original tender award.<sup>226</sup>

Other remedies provided for in section 8 include: directing the administrator to give reasons or to act (or desist from acting) in a particular manner;<sup>227</sup> a declaration of the rights of the parties in respect of the matter to which the administrative action relates;<sup>228</sup> granting a temporary interdict or other temporary relief;<sup>229</sup> and making any order as to costs.<sup>230</sup> Section 8(1)(c)(ii)(bb) provides for a creative remedy in the public law context: it enables a court in ‘exceptional circumstances’ to direct ‘the administrator or any other party to the proceedings to pay compensation’. This innovative addition to the PAJA’s remedial framework is bolstered by section 38 of the Constitution (‘enforcement of Rights’), read with section 172 (‘powers of courts in constitutional matters’), which empower a competent court to grant ‘appropriate relief’ which may include an award of constitutional damages

<sup>219</sup> Ibid para 36. On the *Oudekraal* principle pursuant to which administrative acts (and the exercise of public power more generally) must be treated as valid until set aside by a court, see *Corruption Watch NPC v President of the Republic of South Africa* 2018 (2) SACR 442 (CC) and *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO* [2019] ZACC 36 (9 October 2019).

<sup>220</sup> See also the seminal *AllPay* judgments: *AllPay I* (n 87) and *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency* (No 2) 2014 (4) SA 179 (CC) (the ‘Remedy judgment’).

<sup>221</sup> *Millennium Waste Management v Chairman, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA).

<sup>222</sup> Ibid para 21 read with para 35(e)(i).

<sup>223</sup> Ibid para 29–32.

<sup>224</sup> Ibid para 28.

<sup>225</sup> Ibid para 35(2)(b).

<sup>226</sup> Ibid para 35(2)(c)–(e).

<sup>227</sup> Section 8(1)(a) and (b) of the PAJA (n 18).

<sup>228</sup> Ibid at s 8(1)(d).

<sup>229</sup> Ibid at s 8(1)(e).

<sup>230</sup> Ibid at s 8(1)(f).

aimed at promoting respect for the right in question and deterring future violations. In the case of *Steenkamp NO v Provincial Tender Board, Eastern Cape*,<sup>231</sup> Sachs J in a typically eloquent dissent, highlighted that, '[j]ust compensation today can be achieved where necessary by means of PAJA' which renders it unnecessary to 'stretch the common-law' principles in question.<sup>232</sup> O'Regan J and Langa CJ added in their dissenting judgment that, 'the power to direct the payment of compensation conferred by s 8(1)(c)(ii)(bb) will result in the development of administrative law principles governing the payment of compensation to vindicate the constitutional right to administrative justice'.<sup>233</sup> Finally on the matter of remedies, it should be noted that the Constitutional Court in *Trencon Construction*,<sup>234</sup> clarified the test for exceptional circumstances to substitute or vary the administrative action,<sup>235</sup> in a manner respectful of the separation of powers. This summary illustrates that the PAJA certainly creates scope for the effective exercise of the judicial remedial discretion; however, the extent to which this will meaningfully be harnessed by the courts really remains to be seen.

## 7. CONCLUSION

This Chapter presents a high-level analysis of administrative law of the past and present: it summarises the salient aspects of the 'new South African administrative law' as informed by its 'old' common-law roots. As the analysis, with its case law focus, indicates, this 'new' system of administrative law is still in large part a product of the continued dominance of judicial review which is now available via seven 'pathways', if one counts the addition of state self-review under legality. However, both the Constitution and the PAJA display a willingness to countenance—and arguably, encourage—non-judicial 'checks' to address maladministration and the abuse of public power more generally. Herein lies the promise of a more integrated future for the South African system of administrative *justice*.

Thus, for example, Chapter 9<sup>236</sup> of the Constitution establishes various institutions<sup>237</sup> to investigate and address instances of maladministration and corruption, and the Public Protector has, in particular, proven to be a key player in this

<sup>231</sup> 2007 (3) SA 121 (CC).

<sup>232</sup> *Ibid* para 101.

<sup>233</sup> *Ibid* para 97.

<sup>234</sup> *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* 2015 (5) SA 245 (CC). For an elucidation and analysis of this test, see Lauren Kohn 'The Test for 'Exceptional Circumstances' where an Order of Substitution is sought: An Analysis of the Constitutional Court judgment in *Trencon* against the backdrop of the Separation of Powers' (2015) 7 *Constitutional Court Review* 91.

<sup>235</sup> Section 8(1)(c)(i) of the PAJA (n 18).

<sup>236</sup> 'State institutions supporting constitutional democracy'.

<sup>237</sup> Sections 182–3 of the Constitution (n 8) provide for the establishment of a 'Public Protector', charged with, *inter alia*, investigating 'any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice' (at s 182(1)(a)). Sections 188–9 regulate the office of the Auditor-General, tasked with the function of auditing and reporting on the financial affairs of, *inter alia*, 'all national and provincial state departments and administrations [and] municipalities'.

regard<sup>238</sup>—certainly during Advocate Thuli Madonsela’s incumbency.<sup>239</sup> The Constitution also guarantees the right of access to information in section 32, which right is given detailed legislative effect through the PAIA. These constitutional safeguards indicate the overriding commitment to a version of democracy that is representative, deliberative and *participatory* in nature.<sup>240</sup> In relation to the exercise of administrative action, this constitutional commitment to participatory democracy is strengthened by the legislative measures included in the somewhat creative section 4 of the PAJA which governs administrative action affecting the public. Section 10 of the PAJA is also full of promise—it enables the Minister to make Regulations on (amongst others) the ‘establishment, duties and powers of an advisory council’ in the nature of an Administrative Justice Advisory Council, which again holds potential for the development of an effective integrated system of administrative justice in South Africa.

In sum, South Africa’s system of administrative law is characterised by a state of fluid development in which judicial pronouncements from the highest courts are eagerly anticipated, as lawyers and litigants seek a greater degree of certainty and adherence to predictable principle. Indeed, some have argued that the judicial regulation of the exercise of public power has become the battlefield for waging ‘lawfare’ once again;<sup>241</sup> given the fact that administrative law reflects the theory of state<sup>242</sup> in which it functions and constitutional governance in South Africa has changed radically since 1994. The chief challenge is to secure fidelity to constitutional precepts while widening the focus from judicial review of administrative action to the broader future-fit demands of administrative justice.

<sup>238</sup> See *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) (the so-called ‘Nkandla judgment’).

<sup>239</sup> While the powers of the Public Protector to combat maladministration and corruption became a matter of political fact over the period 2012 to 2017, these powers have recently shown the regrettable potential to be used for other, and perhaps ulterior, purposes.

<sup>240</sup> See *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 110–7.

<sup>241</sup> See in this regard Michelle Le Roux & Dennis Davis *Lawfare: Judging Politics in South Africa* (2019), and Hugh Corder & Cora Hoexter “‘Lawfare’ in South Africa and Its Effects on the Judiciary” *African Journal of Legal Studies* 10 (2017) 105–126 and cf Theunis Roux ‘The Constitutional Court’s 2018 Term: Lawfare or Window on the Struggle for Democratic Transformation’ *Constitutional Court Review X* (forthcoming).

<sup>242</sup> Carol Harlow & Richard Rawlings *Law and Administration* 3ed (2009).



# Pursuing Good Governance

ADMINISTRATIVE JUSTICE  
IN COMMON-LAW AFRICA

## ABOUT THE BOOK

In the age of democratic constitutional government, every citizen expects to be treated fairly by the public administration. Constitutions adopted after 1990 have increasingly contained provisions that oblige the public administration to act lawfully, reasonably and procedurally fairly, and frequently grant citizens the legal right to seek review of administrative action affecting them. Southern African nations have led the way in this movement, closely followed by those in east Africa. This book brings together critical accounts of the development of the broad administrative justice landscape in seven national jurisdictions located in these regions. It does this by analysing trends in the review authority and practice of the superior courts, as well as significant developments in non-judicial monitoring institutions, such as ombuds offices, human rights commissions, and mechanisms to access official information.



## ABOUT THE EDITORS

HUGH CORDER has been Professor of Public Law at the University of Cape Town since 1987. He has led the process of administrative justice reform in South Africa since 1992.

JUSTICE MAVEDZENGE is a Research Officer in the Democratic Governance and Rights Unit in the Faculty of Law at the University of Cape Town, and an expert on Zimbabwean constitutional law.

